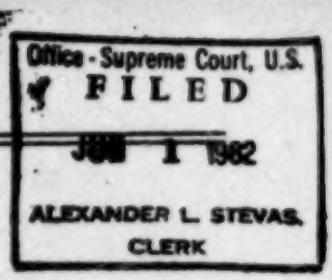
81-2265



NO.

IN THE SUPREME COURT OF THE
UNITED STATES

Term, 1982

ROWAN P. KELLY, JR.,
Petitioner

v.

WARMINSTER TOWNSHIP BOARD OF
SUPERVISORS, FRANCIS J. McKAY,
H. CHARLES FORD, SR., RICHARD
G. LEDOUX, ANDREW L. WARREN,
THOMAS C. HOLTER and CONRAD
YEAGER

On Writ of Certiorari from the United States
Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

Howard T. Gathright, Esq.
Pratt, Clark, Gathright
& Brett
68 East Court Street
Doylestown, Pennsylvania
18901
(215) 345 - 1600

I. QUESTIONS PRESENTED FOR REVIEW

1. Petitioner, a Police Chief of the Township of Warminster (population approximately 35,000), Bucks County, Pennsylvania was fired by the governing body of Warminster Township, a township of the second class, to wit, the Board of Supervisors, on September 27, 1976, in violation of the Equal Protection Clause of the Constitution of the United States.

2. The appeal procedure Petitioner had to follow from his aforesaid firing was set forth in Pennsylvania Statute Act of June 15, 1951, P.L. 586, §2, as amended June 14, 1961, P.L. 348, §1, and last amended July 19, 1965, P.L. 219 §1, Title 53 Purdon's Pennsylvania Statutes Annotated §812, etc., since he was an employee of a second class township under the statutes of the Commonwealth of Pennsylvania, and the procedure set forth therein failed to provide him with the same quality of legal appeal rights as provided to dismissed policemen employed in boroughs throughout the Commonwealth of Pennsylvania, which appeal procedure is set forth in the statutes of Pennsylvania

pursuant to the Act of February 1, 1966, P.L. (1965) ___, No. 581 §1191, as amended by the Act of June 3, 1971, P.L. 145, No. 6, §1 (509(a)(194)).

3. Such disparity in the legal appeal rights from dismissal for policemen in the Commonwealth of Pennsylvania based on the mere happenstance of whether they are employed in a second class township in the Commonwealth of Pennsylvania or in a borough violates the due process of law provisions of the United States Constitution.

4. The Equal Protection clause of the United States Constitution is directed to every form of state action - legislative, executive and judicial.

5. Such lack of uniform treatment of similarly situated parties in Pennsylvania violates the concept of Equal Protection of the Laws as set forth under the Fourteenth Amendment to the United States Constitution.

II. LIST OF PARTIES TO THE PROCEEDINGS

All parties to the proceedings are contained in the caption.

III. TABLE OF CONTENTS

	Page
Table of Authorites	1
Judgments and Opinion of the Courts Below	2
Statement of the Grounds on Which Jurisdiction of this Court is Invoked	3
Constitutional Provision and Statutes Involved	6
Statement of the Case	7

IV. TABLE OF AUTHORITIES

Cases:

Reynolds v. Sims, 377 U.S. 533, 84 S. Ct. 1362, 12 L. Ed. 2nd 506 (1964)

Shelly v. Kraemer, 344 U.S. 1, 68 S. Ct. 836 (1948)

Reed v. Reed, 404 U.S. 71, 76 (1971)

Dandridge v. Williams, 397 U.S. 471 (1970)

In Re: Murchison, 75 S. Ct. 623 (1975)

Statutes:

Pennsylvania Act of June 15, 1951, P.L. 586, 53 P.S. §812

Pennsylvania Act of February 1, 1966, P.L. 1565 (1965), No. 481, 53 P.S. §46191

Fourteenth Amendment to the United States Constitution

V. JUDGMENTS AND OPINION OF THE COURTS BELOW

Attached hereto as Petitioner's Appendix are the following, the contents of which are incorporated herein by reference:

1. Judgment of the Court en banc dated March 23, 1982.

2. Judgment of the Panel dated February 25, 1982.

3. Opinion and Judgment of the District Court dated March 18, 1981.

VI. STATEMENT OF THE GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

Petitioner filed a Complaint in the Federal Court for the Eastern District of Pennsylvania pursuant to 28 U.S.C. §1331, 42 U.S.C. §1983 and 1985 and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Pending the outcome of state court appeal, proceedings in this action were stayed by court order.

Petitioner, following the second class township appeal procedure of the Commonwealth of Pennsylvania participated in administrative hearings before the Warminster Township Board of Supervisors, which Board had initially fired him, and, from an adverse ruling of that Board, filed an appeal to the Court of Common Pleas of Bucks County, Pennsylvania, which Court refused to allow Petitioner to supplement the record by presenting additional testimony. That Court upheld the dismissal action of the Warminster Township Board of Supervisors, which heard the appeal

initially after having fired Petitioner.

Timely appeal was taken to the Commonwealth Court of Pennsylvania, which affirmed the ruling of the court below, but failed to address itself to the equal protection arguments raised by Petitioner. Petitioner's request for the Allowance of an Appeal to the Supreme Court of Pennsylvania was denied and, thereafter, Petitioner renewed his efforts in the Federal Court as indicated above.

The Federal District Court found in Petitioner's favor on the issues of res judicata and collateral estoppel, but then, even while accepting all of Petitioner's averments set forth in his Complaint as true, dismissed such Complaint with prejudice, asserting that equal protection claim was frivolous.

Timely appeal was then filed to the Third Circuit Court of Appeals and the panel, consisting of two Third Circuit Court Judges and a District Judge sitting by designation from the United States District Court for the District of

New Jersey, handed down a 2-sentence Judgment Order affirming the District Court. Thereafter, Petitioner filed a timely Petition for Re-Hearing before the Court en banc and requested oral argument, which had been denied him by the panel.

On March 23, 1982, the Court en banc, consisting of ten Circuit Court Judges and the same District Court Judge sitting by designation from the United States District Court for the District of New Jersey, denied the Petition for Re-Hearing without Opinion.

Petitioner believes that this Court has jurisdiction to review the aforesaid Judgments by Writ of Certiorari pursuant to the United States Code and Rule 21 of this Court.

VII. CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

1. Fourteenth Amendment to the United States Constitution.

2. Pennsylvania Act of June 15, 1951, P.L. 586, 53 P.S. §812.

3. Pennsylvania Act of Feburary 1, 1966, P.L. 1565 (1965), No. 581, 53 P.S. §46191.

VIII. STATEMENT OF THE CASE

Petitioner incorporates herein those facts set forth above, making them a part hereof.

To illustrate Petitioner's position, he sets forth the following:

PENNSYLVANIA DISCHARGED POLICEMEN

SECOND CLASS TOWNSHIPS
53 P.S. §812

1. Board of Supervisors fires.
2. Board of Supervisors sits as judicial tribunal.
3. Court of Common Pleas may allow hearing de novo or additional testimony.

BOROUGHS
52 P.S. §46191

1. Borough Council fires.
2. Independent Civil Service Board sits as judicial tribunal.
3. Court of Common Pleas shall allow hearing de novo and additional testimony.

The issue in this case is not what Petitioner is alleged to have done which resulted in his being fired, but rather the inferior judicial procedures available to him within which to litigate the justification of his firing. While it is certainly

justified under state law to require policemen to abide by a higher standard of conduct than non-policemen, the state laws of the Commonwealth of Pennsylvania should not subject township policemen to a system of justice inferior to that accorded borough policemen. Two separate and unequal systems of justice for discharged policemen should not be permitted to continue in Pennsylvania.

Unless this Court corrects the aforesaid situation, Pennsylvania will continue to have two different and separate standards of justice for discharged policemen, to wit, a sub-standard system for policemen employed throughout Pennsylvania by second class townships, and a superior, impartial and fair system complying with all due process requirements for policemen employed by boroughs throughout Pennsylvania. Such a difference in the laws of Pennsylvania as to dismissed policemen is in violation of the Equal Protection Clause of the United States Constitution.

Petitioner respectfully requests this honorable Court to grant a Writ of Certiorari to permit argument before this Court as to this case since it involves a question of exceptional importance throughout the Commonwealth of Pennsylvania.

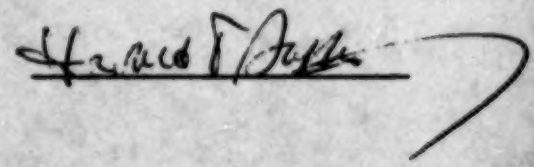
Respectfully submitted,

PRATT, CLARK, GATHRIGHT,
& BRETT

By
Howard T. Gathright, Esq.
Attorney for Petitioner

CERTIFICATION

In accordance with the appropriate Rule of this Court, Howard T. Gathright, Esq., hereby certifies that he is a member of the bar of this Court, having been admitted on May 28. 1968, on motion of Mr. Edward G. Biester, Jr.



APPENDIX

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 81-1660

RONAN P. KELLY, JR.,
Appellant

v.

WARMINSTER TOWNSHIP BOARD OF SUPERVISORS, et al.

(C. A. No. 78-3212)

SUR PETITION FOR REHEARING
EN BANC

Present: SEITZ, Chief Judge, ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER, Circuit Judges, and STERN, District Judge*

The petition for rehearing filed by Appellant

in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

Circuit Judge

Dated: March 23, 1982

* Hon. Herbert J. Stern, United States District Court for the District of New Jersey, sitting by designation.

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

NO. 81-1660

ROWAN P. KELLY, JR.
Appellant

v.

HARRINGTON TOWNSHIP BOARD OF SUPERVISORS and FRANCIS J. McKAY, H. CHARLES FORD, SR., RICHARD G. LEDOUX, ANDREW L. WARREN, THOMAS C. BOLTER and CONRAD YEAGER

On Appeal from the United States District Court for the Eastern District of Pennsylvania
C. A. No. 78-3212

Submitted Under Third Circuit Rule 12(6)
February 18, 1982

Before: ADAMS and SLOVITER, Circuit Judges, and STERN, District Judge.*

JUDGMENT ORDER

After considering all contentions raised by appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellant.

BY THE COURT,

Circuit Judge

ATTEST:

Sally Mrvos, Clerk

DATED: FEB 25 1982

* Hon. Herbert J. Stern, United States District Judge fo. the District of New Jersey, sitting by designation.

Certified as a true copy and issued in lieu of a formal mandate March 31, 1982.

Test: Chief Deputy Clerk, United States Court of Appeals for the Third Circuit.

COPY

Costs taxed in favor of appellees as follows:

Brief $234.12

TOTAL $234.12

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ROWAN P. KELLY, JR.	:	CIVIL ACTION
v.	:	
WARMINSTER TOWNSHIP BOARD OF SUPERVISORS, et al.	:	NO. 78-3212

FILED MAR 18 1981

MEMORANDUM AND ORDER

GILES, J. MARCH 18, 1981

The issue raised by defendants' motion to dismiss is whether either under the principles of res judicata or collateral estoppel this federal action for damages for alleged violations of constitutional and statutory rights [1] is barred by reason of a prior state court proceeding. There, plaintiff's discharge from public employment was upheld on the same matrix of facts, according to defendants, as is involved in this action.[2]

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1. Federal jurisdiction is invoked pursuant to 28 U.S.C. § 1331, 42 U.S.C. §§ 1983 and 1985 and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. Claim also is asserted under a non-existent "28 U.S.C. § 1454."

2. There is no allegation in the complaint that the statutorily specified state procedures for effectuating the discharge were not followed or that plaintiff

ENTERED: 3-19-81

CLERK OF COURT

Plaintiff, Rowan P. Kelly, Jr., former township Chief of Police of Warminster Township, was charged on September 27, 1976 with 39 instances of conduct unbecoming an officer and after a public hearing was found responsible as to 29. A record was made of the administrative hearing before the Warminster Township Board of Supervisors ("Board"). An appeal was taken from the adverse decision to the Pennsylvania Court of Common Pleas of Bucks County. After reviewing the record below, the Honorable Harriet M. Mimms upheld the dismissal action by Opinion and Order dated February 8, 1978 (hereinafter "Common Pleas Opinion"). Thereafter, a timely appeal was taken to the Pennsylvania Commonwealth Court which on April 5, 1979 affirmed the ruling below (hereinafter "Commonwealth Court Opinion"). Plaintiff's Petition for Allowance of Appeal to the Pennsylvania Supreme Court was denied by order of January 3, 1980 (hereinafter "Pennsylvania Supreme Court Order"). As part of his Petition,

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footnote 2 continued

was terminated for an impermissible reason. Nor does plaintiff contend that the factual determinations in the state court proceedings were contrary to the record evidence. See, Bishop v. Wood, 426 U.S. 341 (1976); Olson v. Borough of Homestead, 417 F. Supp. 784, 787 (M.D. Pa. 1976), aff'd 568 F.2d 769 (3d Cir. 1978) (any property interest in public employment derives from state law, not the federal constitution). Although there is an assertion of a § 1985 conspiracy, there is no allegation that plaintiff is the victim of invidious discrimination, or is a member of a suspect classification. Rosin v. Bensalem Township, 616 F.2d 680, 696 (3d Cir. 1980).

plaintiff attached a Summary of Argument (hereinafter "Summary of Argument").

The complaint in this court was filed on September 26, 1978. Pending the outcome of the state court appeals, proceedings in this action had been stayed by court order. With denial of the Petition for Allowance of Appeal, plaintiffs efforts here were renewed. Since matters outside the pleadings have been presented or referenced for consideration, i.e., the administrative record and the state court opinions and orders, and the parties have had full opportunity to argue on their applicability, the motion to dismiss will be treated as one for summary judgment under Rule 12(b)(6), Fed. R. Civ. Pro. See DeTore v. Local #245, 615 F.2d 980, 983 (3d Cir. 1980). In addition, I have reviewed the record proceedings before the administrative board and the Court of Common Pleas in assessing the motion to dismiss the § 1983 action based on estoppel. Kauffman v. Moss, 420 F.2d 1270, 1274 (3d Cir. 1970), cert. denied, 400 U.S. 846 (1970).

I. THE STATE COURT PROCEEDINGS

Plaintiff was hired as Police Chief in December, 1974 and was granted tenure by the Board of Supervisors a year later in December, 1975. The plaintiff promulgated a policy within the police department that all

police business was to be kept confidential and any employee revealing any orders or directives of the plaintiff to persons outside the department would be disciplined. The authority to govern the police department rests with the Board. When a police lieutenant, defendant Conrad Yeager, a twenty year veteran of the department was suspended by the plaintiff, without approval of the Board, for revealing one of his "confidential" general orders, an intensive general investigation of the plaintiff's conduct in office was undertaken by the Township Manager. This led to the dismissal action. (Common Pleas Opinion, p. 1, 5-6). Plaintiff demanded an appeal hearing, pursuant to the Police Tenure Act, June 15, 1951, P.L. 586, 53 P.S. § 811 et seq., to test the truth or falsity of the charges against him. The hearing was conducted before the Board. After five days of proceedings and approximately 750 pages of transcript, the Board reaffirmed the original discharge action (Common Pleas Opinion, p.1).

Although plaintiff was represented at the hearing before the Board by two able attorneys, he elected not to testify or offer any evidence on his own behalf as a matter of strategy, choosing to save his evidence for an appeal to the Court of Common Pleas should the dismissal be confirmed. (Id., at 2)[3] The Board also made itself

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3. The Board retained independent counsel to advise it during the hearings. (Common Pleas Opinion, p.12)

available to answer questions regarding allegations plaintiff may have had as to any actual bias on the part of any member of the Board. Plaintiff, however, chose not to take full advantage of the offer, again for tactical reasons. (Common Pleas Opinion, p.12).

Following the adverse determination before the Board, plaintiff appealed to the Court of Common Pleas of Bucks County. He claimed that the Board was inherently biased because of commingled investigatory, prosecutorial and adjudicatory functions, that the Board members were actually biased and that he was denied substantive and procedural rights at the hearing.

Plaintiff attempted to persuade the Court of Common Pleas that he should be allowed to present evidence that might have otherwise been presented in the administrative hearing. His argument was rejected on two grounds. First, the court found that plaintiff was not entitled as of right to supplement the record. The determination of the adequacy of the record to meet the review standard of clear and convincing evidence was held to be committed to the sound discretion of the court[4] and

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4. The court held that while the Police Tenure Act was silent on the subject, it was clear under the Local Agency Law of December 2, 1968, P.L. 1133, 53 P.S. § 11308 (repealed Apr. 28, 1978, 42 P.S. § 20002 [1429]; substantially reenacted 2 Pa.C.S. Ann. § 754 et seq.

in his case, the record was sufficiently full and complete to demonstrate that the dismissal action was well founded. (Common Pleas Opinion, p.7). Second, the court concluded that plaintiff had had every right and opportunity to present substantive evidence in his own behalf and that his substantive and procedural rights had been meticulously protected (Id., at 12).[5] The Commonwealth Court ruled that the court below had not abused its discretion in refusing to take additional testimony under circumstances where the absence of testimony or evidence was solely the result of his own decision made with the assistance of counsel. It affirmed that there was clear and convincing evidence of misconduct by plaintiff warranting his dis-

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footnote 4 continued

(Supp. 1980)) and by case law, that the sound discretion of the court controls in determining whether judicial review shall be de novo. (Common Pleas Opinion, p.2).

5. At a hearing, the Common Pleas Judge gave plaintiff an opportunity to supplement the record with relevant evidence which he was demonstrably precluded from offering in the administrative proceedings or evidence that was unavailable to him. He did not satisfy the court that such evidence existed. Kelly v. Warminster Township, No. 76-1097A-10-6, Tr. at 37-38, 53-59 (C.P. Bucks, Apr. 21, 1977).

charge, (Commonwealth Court Opinion, p.2-3).[6] It also found from the record that petitioner's due process rights were not violated in any respect. Id.

Although plaintiff had unsuccessfully challenged the constitutionality of the Police Tenure Act below, he raised for the first time on appeal to the Commonwealth Court an equal protection of the laws argument. In effect, he contended that in having to proceed under the Police Tenure Act, township policemen were not given the same due process protections as borough policemen who are subject to the Borough Code, Act of February

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6. Plaintiff's misconduct was found to be violative of numerous aspects of codes of conduct for police officers. Among the violations were (1) a physical and verbal assault on a district justice as well as physical assaults on other persons at other times; (2) issuance of a general order, without approval by the Board or township manager directing police officers not to enforce Sunday blue laws; (3) taking improper liberties with female employees of the police department, including soliciting an unnatural sex act, a "blow job", from one female employee and unzipping the jacket and kissing another female employee against her wishes; (4) consorting with a married woman, not his wife, around the police station and in public; (5) directing the non-enforcement of the laws in a troubled situation until the antagonists had fought it out and the winners could be arrested; (6) being intoxicated while on duty; (7) promulgation of a general order, to be kept secret, regarding reporting of the bail policy of a district justice; (8) use of profane and vulgar language; (9) violating the collective bargaining agreement; (10) promulgation of a general intra-department secrecy order that forbade disclosure by any employee of the department of any orders or directives of the chief of police to non-members of the department, including the township manager or board of supervisors on pain of discipline - many of the orders being sarcastic and threatening to department employees; (11) suspending a 20 year veteran of the police force, Lieutenant Conrad Yeager, a defendant herein, for allegedly breaching that secrecy order. (Common Pleas Opinion, pp. 5, 15-17).

1, 1966, P.L. (1965) 1656, 53 § 45101 et seq.[7] The court declined to reach this last issue since it had not been properly raised in or considered by the court below. (Commonwealth Court p.4) [8]

Plaintiff then petitioned for allowance of appeal to the Pennsylvania Supreme Court raising the equal protection argument as well as all his other contentions. That petition was denied.

Plaintiff resists the defendants' motion to dismiss arguing that (1) he was denied the opportunity to litigate fully the constitutionality and legality of his firing before either the Board or the Court of Common Pleas; (2) the Board members were actually biased against

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7. 53 P.S. § 46191, pertaining to appeals from dismissals or removals, reads in pertinent part, "Upon such appeal being taken and docketed, the Court of Common Pleas shall fix a day for a hearing and shall proceed to hear the appeal on the original record and such additional proof or testimony as the parties concerned may desire to offer in evidence." However, this "right" to supplement the record appears to be limited by what the court deems relevant. See Borough of Bristol v. Downs, 48 Pa. Cmwlth. 46, 409 A.2d 467, 469 (1979).

8. The Borough Code, 53 P.S. §§ 46121, 46171, provides for the establishment of civil service commissions in boroughs of the Commonwealth having more than three (3) salaried policemen. The primary responsibility and discretion for discipline of police officers, however, rests with the borough council. The civil service commission's scope of review of disciplinary decisions is limited to whether the council abused its discretion.

him, having conspired prior to the hearing to fire him; (3) he has sued parties who were not parties in the state court action; and (4) the equal protection of the laws issue was not raised or decided in the prior action.

II. RES JUDICATA

Defendants argue first that the complaint must be dismissed under principles of res judicata because it involves the same cause of action, the same set of facts and the same parties or their privies. Res judicata operates to bar "repetitious suits involving the same cause of action and rests upon considerations of economy of judicial time and public policy favoring the establishment of certainty in legal relations." Sea-Land Services, Inc. v. Gaudet, 414 U.S. 573, 578 (1973) quoting from Commissioner v. Sunnen, 333 U.S. 591, 597 (1948) and Cromwell v. County of Sac, 94 U.S. 351, 352 (1877).

> "[W]hen a court of competent jurisdiction has rendered final judgment on the merits of a cause of action, both the parties to the suit and their privies are thereafter bound not only to every matter actually raised but also as to every other admissible matter which might have been offered for the same purpose."

Sea-Land, supra, 414 U.S. at 578-579. See, Allen v. McCurry, 49 LW 4015, (U.S. December 9, 1980) (doctrines of res judicata and collateral estoppel held to apply to 42 U.S.C. § 1983 claims).

For the doctrine of res judicata to apply there must be a concurrence of four conditions: (1) identity of theory sued upon; (2) identity of the cause of action; (3)

identity of persons and parties to the action; and identity of quality or capacity of the parties suing or being sued. Holt Hauling & Warehousing v. Rapistan, Inc., 448 F. Supp. 991, 996 (E.D. Pa. 1978); Safeguard Mutual Insurance Co. v. Williams, 463 Pa. 567, 574 (1975). If these factors are found to exist, then the court must determine whether the ultimate and controlling issues have been decided in a prior proceeding in which the present parties had an opportunity to appear and assert their rights. Holt Hauling & Warehousing, supra.

Here, the state court proceeding involved the questions of whether (1) there was clear and convincing evidence warranting the Board's discharge of plaintiff, (2) whether plaintiff was denied constitutional requirement due process in the administrative proceeding by reason of the commingled functions of the Board or actual bias of its members and (3) whether, as of right, he was entitled to supplement the record on appeal to the Court of Common Pleas. Only the Warminster Township Board of Supervisors was named as a defendant and plaintiff had no alternative but to appeal the dismissal within the strictures of the Police Tenure Act. 53 P.S. § 815.

Although Section 8 of the Local Agency Law, 53 P.S. § 11308 [9] does provide for a review of claims of

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9. Local Agency Law, Ch. 30A, 53 P.S. § 11308

constitutional denials, In Re Gettler, 42 Pa. Cmwlth. 415, 400 A.2d 1339 (1979), there is no provision for the making of a claim for damages for any violations of constitutional or statutory rights. While the state reviewing court has the power to reinstate a successful appellant with back pay, benefits and emoluments of office, its review of the record evidence or the supplemented record

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(repealed Apr. 28, 1978, 42 P.S. § 20002 [1429] substantially reenacted 2 Pa. C.S. Ann. § 754 et seq. (1980)):

> "(a) In the event a full and complete record of the proceedings before the local agency was not made, the court may hear the appeal de novo, or may remand the proceedings to local agency for the purpose of making a full and complete record or for further disposition in accordance with the order of the court.
>
> "(b) In the event a full and complete record of the proceedings before the local agency was made, the court to which the appeal is taken shall hear the appeal without a jury on the record certified by the local agency. After hearing, the court shall affirm the adjudication unless it shall find that the same is in violation of the constitutional rights of the appellant, or is not in accordance with law, or that the provisions of this act have been violated in the proceeding before the agency, or that any finding of fact made by the local agency and necessary to support its adjudication is not supported by substantial evidence. If the adjudication is not affirmed, the court may set it aside or modify it, in whole, or in part, or may remand the proceeding to the local agency for further disposition in accordance with the order of the court."

is directed entirely to affirming or modifying the decision of the local agency. 400 A.2d at 1341. Here, plaintiff seeks damages for wrongful dismissal and violation of constitutional rights. The Pennsylvania statute accorded judicial review of the administrative proceedings but plaintiff could not seek damages before either the Board of Supervisors of in the state courts on appeal from the adverse decision. Accordingly, this court holds that there is no identity of the causes of action in the state court and federal court proceedings, and that the doctrine of res judicata does not apply. See Riverside Memorial Mausoleum, Inc. v. UMET Trust, 581 F.2d 62, 68 (3d Cir. 1978).[10]

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10. In Riverside the court held that an adverse decision against a borrower in a proceeding to open a confessed judgment obtained by a broker was not res judicata to a later action by the borrower against the broker for malicious interference with his business. The later action was a tort claim, a separate cause of action, and was not a defense to the note. Therefore, it could not have been asserted as a counterclaim in the prior proceeding. Similarly, in Cubas v. Rapid American Corp., Inc., 420 F. Supp. 663, 669, fn. 10 (E.D. Pa. 1976) the district court held in an employment discrimination action that prior adverse administrative decisions were not res judicata of claims of a former employee against his former employer and union pertaining to alleged collusive discharge and breach of collective bargaining agreements.

III. COLLATERAL ESTOPPEL

The doctrine of collateral estoppel applies:

> "where the second action between the same parties is upon a different cause or demand . . . . In this situation, the judgment in the prior action operates as an estoppel, not as to matters which might have been litigated and determined, but 'only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered.' . . . Since the cause of action involved in the second proceeding is not swallowed by the judgment in the prior suit, the parties are free to litigate points which were not at issue in the first proceeding, even though such points might have been tendered and decided at that time. But matters which were actually litigated and determined in the first proceeding cannot later be relitigated."

Sea Land Services v. Gaudet, supra, 414 U.S. at 593 (citations omitted). Accord, Montana v. U.S., 440 U.S. 147, 153 (1979) ("Under collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to prior litigation.")

Thus, collateral estoppel is a broader concept than res judicata. It requires only the same issue of fact and the same party, or privy, against whom the defense is invoked. The cause of action need not be the same nor need the parties have a balance of identity.

Holt Hauling & Warehousing v. Rapistan, supra, 448 F. Supp. at 996, fn. 12. The doctrine of collateral estoppel precludes the relitigation of issues actually decided in former judicial proceedings. In assessing its application to any issue there are four requirements that must be satisfied:

> (a) the issue decided in the prior adjudication must be identical with the one presented in the later action;
>
> (b) there must have been a final judgment on the merits;
>
> (c) the party against whom the plea is asserted must have been a party or in privity with a party to the prior adjudication; and
>
> (d) the party against whom it is asserted must have had a full and fair opportunity to litigate the issue in question in the prior action.

See, Montana v. United States, 440 U.S. 147, 153-54 (1979); Blonder-Tongue v. University of Illinois Foundation, 402 U.S. 313, (1971); Public Service Mutual Insurance Co., 616 F.2d 704, 707 (3d Cir. 1980). The doctrine of mutuality has been abolished for federal court suits, Allen v. McCurry, supra, 49 LW at 4017, and under Pennsylvania law, see, In re Estate of Ellis, 460 Pa. 281, 286-87 (1975).

A. The Parties Are Identical Or In Privy

The Supervisors and Holter were acting at all

times as agents of the Township and were, therefore, in privy with the Township defendant in the state court proceedings as to all matters related to and affecting plaintiff. While Yeager is alleged as a defendant in the federal complaint it is only as to a § 1985 conspiracy claim. A conspiracy claim was neither advanced nor labeled as such in the state court proceeding. However, plaintiff did raise and litigate the issues of alleged actual bias by the Supervisors, as well as all aspects of due process, including the propriety of the conduct of the investigation initiated by Holter. Whether Holter participated in the ultimate decision-making process was an issue also raised and decided. (Commonwealth Court Op. p.2-3).

The conspiracy allegations found in paragraph 8 of the federal complaint consist of the following: (1) the four defendant Supervisors attempted to force plaintiff to drop his demand to join the police department's collective bargaining unit; (2) the Board considered abolishing the position of chief of police, obtained a legal opinion on the subject but did not abolish the position; (3) on September 8, 1976 Holter delayed the suspension of Yeager who had complained to him about plaintiff; (4) an investigation was commenced by Holter based on Yeager's complaints; (5) based upon information obtained through the investigation, Holter, in the presence of defendant Supervisor Warren, told plaintiff the investigation

revealed serious charges which could be aired in public and gave him the option of resigning or facing a formal request for his dismissal at the next public meeting; (6) Holter refused to tell plaintiff the charges being made against him at that time; (7) plaintiff refused to resign and Holter followed through on his recommendation of dismissal to the Board of Supervisors, on September 27, 1976 at which time he was apprised of the charges; (8) defendant Supervisor McKay was present when a witness against plaintiff gave an oral statement to Holter during the investigation of charges; (9) prior to October 6, 1976, after plaintiff demanded a public hearing, Holter sent a letter to all employees of the police department advising of the dismissal action taken by the Board, the necessity to give "correct answers" during his investigation and offering to give immunity from discipline or prosecution as the result of information supplied in the investigation, all with the purpose "to pressure prospective witnesses to give false testimony"; (10) the Supervisors denied plaintiff copies of several written witness statements at the public hearing; (11) the Supervisors refused to give him prehearing notice and discovery procedures generally accorded criminal defendants; and (12) the Supervisors refused to answer questions under oath concerning bias, interest or prejudice against plaintiff. (Complaint ¶ 8).

The only conspiracy allegation involving Yeager is that he agreed with the other defendants that the police department employees should be sent the letter discussing plaintiff's dismissal. Id. (¶ 8c) It is not alleged that Yeager drafted or mailed the letter. Rather, it is alleged that Holter sent the letter in his official capacity as Township Manager.

Despite plaintiff's allegation that the purpose or effect of the letter was to pressure policemen or other employees into giving false testimony, no allegation exists in the complaint that witnesses who appeared against him actually gave false testimony, or were pressured to testify by the letter or by any improper action of Yeager, or the other defendants. That Yeager merely complained to Holter about his suspension or that he felt wronged by plaintiff is immaterial to a federal conspiracy theory. Yeager had the protected right to complain. 53 P.S. § 815. Moreover, the letter by Holter, which is incorporated into the complaint by reference, does not, on its face, ask prospective witnesses to do anything other than to give correct or truthful answers under oath.[11]

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11. The text of the letter as alleged in paragraph 8(c) of the complaint, without plaintiff's emphasis is as follows:

> As you know, the Chief of Police has been dismissed. In addition to the specific charges already filed against

The letter must be viewed in the context of plaintiff's admitted conduct of promulgating a policy within the police department that all police business, including his orders and directives, were to be kept confidential and secret from non-members of the department on pain of discipline. Yeager had been accused by plaintiff of breaching that policy and had been summarily suspended.

Merely adding parties does not preclude the scrutiny of the court as to whether plaintiff is collaterally estopped. "Identity of parties is not a mere matter of form, but of substance. Parties nominally the same may be, in legal effect, different . . . and parties nominally different may be, in legal effect, the same." Chicago, R.I. & P. Ry. Co. v. Schendel, 270 U.S. 611, 620

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footnote 11 continued

> him, there have been numerous reports concerning improper or illegal behavior on his part. As a result of the facts, I, the Township Manager, have been asked to conduct a full inquiry into this matter.
>
> In order to conduct a full investigation, each police officer and civilian employee . . . is required to answer questions concerning the conduct of Rowan P. Kelly . . . Each officer and employee who is interviewed is granted full immunity from discipline or from prosecution as a result of information supplied in this inquiry. Any officer who fails to cooperate with investigation or who is suspected of providing incorrect answers to questions may be subject to disciplinary action. Your testimony is being recorded and will be transcribed. You will be asked to sign the transcription of your testimony.

(1926) (citations omitted). Here, viewing the allegations in the light most favorable to plaintiff, Yeager is alleged to have been an agent of the Township in the conduct of the investigation of plaintiff. As such, Yeager, like Holter, was in privy with the Board and the Township. Accordingly, the court finds that the defendants to this action were in privity with the Township, a party (defendant) to the state court action.

B. The Issues Material to Defendants Are Identical

The allegation of conspiracy in a later action based upon the same material facts as were present in a prior action does not suffice to defeat the estoppel doctrine. See, Williamson v. Columbia Gas & Light Corp., 186 F.2d 464, 467-68 (3d Cir. 1950) cert. denied. 341 U.S. 921 (1951). Cf. Riverside Memorial Mausoleum v. UMET, supra, 581 F.2d at 67 (alleging conspiracy with respect to claims adjudicated in state court was held insufficient to defeat application of res judicata).

Moreover, the fact that an issue arises in a slightly different context in the second action does not necessarily mean that collateral estoppel is inapplicable. Public Service Mutual Insurance Co. v. Cohen, supra, 616 F.2d at 708. Plaintiff's factual allegations in the federal action amount to no more than that his services were

terminated by the Board after an investigation report by the Township Manager and that the Board reaffirmed the action after an appeal hearing. The claim that the individual defendants, who were all known actors in the administrative proceeding, are conspirators neither succeeds in creating different parties nor in creating different issues.[12]

Plaintiff has not alleged any new facts to support his section 1983 or 1985 claims that defendants engaged in impermissible actions violative of due process. It is not alleged that the Board violated any law or regulation when it sought and received a legal opinion on abolishing the position of Chief of Police, or when it demanded that the plaintiff drop his request to be a member of the bargaining unit which he supervised, or when Holter conducted an investigation affording plaintiff the opportunity to resign.

The Board of Supervisors is responsible for the conduct of the police department. These matters seem

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12. The equal protection of the laws issue discussed infra, is not material to the named defendants because the Pennsylvania Legislature and not the Township prescribes the applicable judicial review procedures for administrative hearings. Even assuming that the acts of the defendants involved the Equal Protection Clause, taking the allegations of plaintiff as true, plaintiff has not stated an Equal Protection claim upon which relief may be granted.

legitimately within the operational or administrative duties of the Board. More importantly, these were all factual issues specifically addressed and decided by the Court of Common Pleas. After scrutinizing the trial record, that Court found there was no evidence of bias in the conduct of the hearing by the Board within the concerns of Withrow v. Larkin, 421 U.S. 35, 46, 55, 58 (1975).[13] (Common Pleas Opinion, p.13).

The Court of Common Pleas, the Commonwealth Court, in affirming, and the Pennsylvania Supreme Court in denying allocatur, have found that by a clear and convincing evidence standard (1) plaintiff had a full and fair opportunity to present evidence at the hearing and his decision not to do so was made with the assistance of two able counsel for reasons of strategy, i.e., he believed he could wait to present all his evidence to the Court of Common Pleas. (Common Pleas Opinion, p.2); (2) the Board meticulously protected plaintiff's procedural and substantive rights at the hearing (Id. 12); (3) the Board made

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13. The combination of investigative and adjudicative functions does not, without more, constitute a due process violation as creating an unconstitutional risk of bias. (Id. at 58). "It is . . . very typical for the members of administrative agencies to receive the results of investigations, to approve the filing of charges or formal complaints . . . and then to participate in the ensuing hearings. This mode of procedure does not violate . . . due process of law." (Id. at 56).

itself available to answer questions under oath as to any actual bias and plaintiff chose not to take full advantage of the offer (Id.); (4) there was no competent evidence that any predisposition, bias or prejudice existed on the part of any Board member which denied plaintiff a fair hearing (Id.); (5) the charges brought were not originally preferred by the Board but were merely presented by the Board upon information received from the Township Manager; (6) there was no bias in the conduct of the hearing (Id. 13), See, Withrow v. Larkin, supra; cf. In Re Murchison, 349 U.S. 133 (1955); (7) because it was a civil proceeding plaintiff was not entitled to discovery of witnesses' written statements obtained by the Township Manager in preparation for the hearing nor was he entitled to a bill of particulars as a defendant may be in a criminal case (Id. 14); (8) the Board of Supervisors was justified in summary dismissal action, instead of suspension pending a hearing, because under the Police Duty Manual some of the charges called for immediate dismissal without prior suspension pending adjudication and, in any event, the hearing demonstrated the dismissal action was well founded (Id. 12); (9) the commingled function of the Board in this instance was consistent with federal constitutional requirements of due process; (10) the fact that one of the supervisors sat in on some of the questioning of witnesses during the investigation was not violative of plaintiff's

due process rights; (Id. 6); (11) denial of his request to sit as Chief of Police on the negotiating team of police officers during contract negotiations was not evidence of bias (Id. 6, Cf. complaint ¶ 8(a-c); (12) one of the Supervisors circulated a letter discussing the budget that had been drafted by plaintiff but that was not evidence of bias (Id., cf. complaint ¶ 9(a)); [14] (13) plaintiff was not entitled to a de novo hearing as a matter of right; and (14) the Police Tenure Act was constitutional, meeting the requirements of due process and fundamental fairness.

The state courts affirmed conclusively that the evidence demonstrated a pattern of conduct by plaintiff unbecoming a police officer, that such acts would have a tendency to destroy public respect for police officers, and would undermine the confidence in the police department. (Common Pleas Opinion at 17.) See, Faust v. Police Civil Service Commission of Borough of State College, 2 Cmwlth. Ct. 123, 347 A.2d 765 (1975); Nicholas

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14. There is nothing in ¶ 8 of the complaint which states or suggests that it was legal for the Police Chief to be a member of the bargaining unit whose members he supervised and disciplined or in ¶ 9 that the criticisms of his budget were not fair and factual. The Court of Common Pleas fully considered these contentions and found no evidence of actual bias.

Fabio v. Civil Service Commission of the City of Philadelphia, 30 Pa. Cmwlth. 203, 373 A.2d 751 (1977).

Plaintiff has not raised a single new issue. He has not alleged that either defendant has done anything beyond the scope of his office or position.

The federal action amounts to no more than a rephrasing of the challenge made in the first action that there was a denial of due process because the body which fired him was administratively investigator, prosecutor and judge. This issue was litigated to final judgment in the state court, and now is precluded by collateral estoppel. It is of no assistance to plaintiff that he now uses the word "conspiracy" to describe the investigatory process which involved the Township Manager, the suspended police lieutenant and the four members of the Board. The Court of Common Pleas considered plaintiff's request to supplement the record and denied it on the basis that the record evidence was replete with clear and convincing evidence that plaintiff was properly discharged because of misconduct.

> "[M]erely adding some facts, naming additional defendants or proposing a different theory of recovery does not convert one cause of action into a second cause of action if both actions involve the same liability creating conduct on the part of the defendants and the same alleged violation of the plaintiff's rights."

Coggins v. Carpenter, 468 F. Supp. 270, 280 (E.D. Pa. 1979) (considering the application of res judicata); see also, Sims v. Mack Trucks, Inc., 463 F. Supp. 1068 (E.D. Pa. 1979). For these reasons, the court holds that as to each legal theory raised in the instant complaint, except equal protection, each of the requisites for application of collateral estoppel has been satisfied. Plaintiff's action is barred by collateral estoppel except as to the equal protection claim.

IV. THE EQUAL PROTECTION CLAIM IS FRIVOLOUS

Plaintiff advances two arguments. Allegedly under the Borough Code policemen are subject to discipline and may demand a hearing before a civil service commission as opposed to a commingled function body such as a board of supervisors in a township of the second class.[15] It is also alleged that borough policemen have the right to supplement the record on appeal to the Court of Common Pleas.

First, it should be noted that under the Borough Code the control of the police force is in the hands of the township council and although there is a civil service review system, the scope of that administrative review is very limited. Borough of Bristol v. Downs, supra. Further, while Section 509(a)(174) of the Borough Code, 53 P.S. § 46191, does read, in part, "the court. . . shall proceed to hear the appeal on the original record and such additional proof or testimony as the parties may desire to read into evidence," it does not appear to have been judicially interpreted as a mandatory obligation upon

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15. Warminster Township is a township of the second class. The Police Tenure Act applies, not only to townships of the second class, but also to boroughs and townships of the first class having a police force of less than three members and not otherwise covered by the Borough Code. 53 P.S. § 811.

the reviewing court to allow such evidence. Rather, receipt of additional evidence is committed to its sound discretion, that judgment being guided by the nature of the charges and the extent of the record before the civil service commission. Borough of Bristol, supra, (although the Court of Common Pleas may consider additional evidence on appeal, such evidence must at least be related to issues raised below).

However, even assuming the correctness of plaintiff's interpretation of the relevant state statutes, the equal protection argument still fails. Plaintiff has not alleged that there is any invidiously discriminatory state purpose in any difference between the review system for borough policemen and township policemen, that he is a member of a suspect classification, such as race or sex, or that he is the victim of disparate treatment as the result of an arbitrary or irrational act by the Commonwealth. U.S. Railroad Retirement Board v. Fritz, 49 LW 4035, 4037-4038 (U.S. filed Dec. 9, 1980); Jamieson v. Robinson, No. 79-0429 slip op. at 7-9 (3d Cir. February 12, 1981). He has not, and cannot, allege that as a matter of law, commingled function review bodies are inherently biased and incapable of protecting constitutional rights. See, Withrow v. Larkin, 421 U.S. 35 (1975). Therefore, we are left with plaintiff's contention precisely as he has pleaded it: simply because

policemen of second class townships do not come under a civil service commission system or a judi[illegible] review system identical to that of borough policemen, there is a denial of equal protection (Complaint ¶¶ 17, 18).

Almost forty years ago the Pennsylvania Supreme Court considered and passed on a like argument in the context of a challenge by small boroughs and townships, not covered by civil service, to the constitutionality of the Police Civil Service Act of 1941. The township and borough plaintiffs claimed the Act was special legislation. This Act, the predecessor of Borough Code, 42 P.S. § 4671, was held to be a law of general application. It provides for the appointment of a police civil service commission to adopt rules and regulations for the appointment, promotion and reduction in rank, suspension and removal of paid members of the police force in boroughs, incorporated towns and first class townships having three or more paid officers. Act of June 5, 1941, P.L. 84. Haverford Township v. Siegle, 346 Pa. 1 (1942); Bragdon v. Ries, 346 Pa. 10 (1942). The court pointed out that the Act comes into play only when a township acquires a sufficient police organization to warrant its application. The court stated,

> "These cases make it clear that the legislature has the right, in regulating a particular class to exclude certain members of the class to whom the Act can have no

useful application. A township having one or two or no police officers would be justified in objecting strenuously to the expense and inconvenience of maintaining a complete system of police civil service which would have no function to perform. This exception in the legislation does not constitute a classification of boroughs, towns and first class townships. The Act is general in both purpose and scope. The exception is reasonable and necessary, and is based on considerations as plain as they are sound.

* * * * * *

Finally, it is argued that the Act violates the twenty-sixth clause of section 7, Article III, prohibiting local or special laws granting to any corporation or individual any special privilege or immunity. It is said that the statute grants privileges to members of the police force in first class townships having a police force of more than three members, and denies them to policemen in other such townships. The obvious answer is that such differences always happen whenever legislation regulating municipal affairs is made effective in certain municipalities and not in others. If such an argument were sound, civil service could never have been inaugurated unless it were done in every city, town, borough and township in the Commonwealth at the same time. The patent unreasonableness of such a suggestion destroys it.

All of which leads to the conclusion that the Police Civil Service Act of 1941, P.L. 84, is constitutional, and we so declare it.

Haverford Township v. Siegel, 346 Pa. at 5, 9.

Equal protection is not necessarily violated where reasonably based statutory classifications result in inequality. Dandridge v. Williams, 397 U.S. 471 (1970). Nor does the Equal Protection clause require a state to duplicate in all administrative proceedings the methods of

providing full and fair review. However, it does require that the person affected by the state process be given an adequate opportunity to present his claims in the context of the review procedure. Ross v. Moffit, 417 U.S. 600, 616 (1974). Exact equality is not always a prerequisite of Fourteenth Amendment equal protection. Norvell v. Illinois, 373 U.S. 420, 423 (1962). A state may treat different legislatively created classes of individuals differently if there is a rational relationship to the statute's objectives. Reed v. Reed, 404 U.S. 71, 76 (1971). Thus, as the Court stated in Metropolis Theatre Co. v. Chicago, 228 U.S. 61, 69-70 (1913):

> "The problems of government are practical ones and may justify, if they do not require rough accommodations - illogical, it may be, and unscientific. . . What is best is not always discernible; the wisdom of any advice may be disputed or condemned."

The legislative history of the Police Civil Service Act, judicially reviewed, is clear: Pennsylvania has a rational reason for the reach of the civil service system. Rough accommodations made by government do not violate the Equal Protection Clause unless the lines drawn are invidious and purposeful. Norvell v. Illinois, 373 U.S. at 424; Washington v. Davis, 426 U.S. 229 (1976). See also, U.S. Railroad Retirement Board v. Fritz supra. The Equal Protection Clause does not guarantee exact

treatment. It does guarantee that persons similarly situated are to be similarly treated. Vandermark v. Housing Authority of City of York, 492 F. Supp. 359, 363 (M.D. Pa. 1980). Different treatment of persons similarly situated may be justified if such treatment is reasonably related to a legitimate government interest, and is not based upon invidious discrimination or a suspect classification. Delaware River Basin Commission v. Bucks County Water & Sewer Authority, No. 80-1662, slip op. at 8-10 (3d Cir. Feb. 18, 1981).

The Equal Protection Clause does not require that every Pennsylvania municipal policeman have identical review procedures, regardless of the circumstances.

This court is convinced that the hearing procedures imposed by the state upon the civil service commissions for borough policemen and upon townships of the second class comply as to township policemen with the requirements of constitutional due process.[16] See Withrow v. Larkin, supra. On the existing record, it is

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16. "The fundamental requisite of due process of law is the opportunity to be heard. Grannis v. Ordean, 234 U.S. 385, 394 (1914). The hearing must be 'at a meaningful time and in a meaningful manner.' Armstrong v. Manzo, 380 U.S. 545, 552 (1965)." Goldberg v. Kelly, 397 U.S. 254, 267 (1970); In re Application of U.S.A., 610 F.2d 1148, 1156-1157 (3d Cir. 1979). In this case plaintiff had notice, a hearing, the right to present evidence and challenge evidence presented against him, and the right to counsel. Further, on appeal he had the opportunity to supplement the record to the extent that the

apparent that plaintiff was accorded a due process hearing substantially the same as that accorded to a borough policeman.

Therefore, taking all of plaintiff's allegations of fact as true, he has, nevertheless, failed to state an equal protection claim upon which relief can be granted.

V. CONCLUSION

Accordingly, for the reasons stated above, plaintiff's complaint is dismissed with prejudice.

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footnote 16 continued

Warminister Supervisors precluded him from presenting relevant evidence or denied him access to such evidence. Plaintiff failed to show that the supervisors precluded his presentation of or denied him access to relevant evidence. Finally, plaintiff was given the reasons for his discharge. See p.7, n.6, supra, outlining the many instances of plaintiff's alleged misconduct.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ROWAN P. KELLY, JR.	:	CIVIL ACTION
v.	:	
WARMINSTER TOWNSHIP BOARD OF SUPERVISORS, et al.	:	NO. 78-3212

ORDER

AND NOW, this 18th day of March, 1981, it is hereby ORDERED that for the reasons stated in the foregoing opinion, plaintiff's complaint is DISMISSED, as to each defendant, with prejudice.

BY THE COURT:

_____
J.

81-2265

Office - Supreme Court, U.S.
FILED
JUN 1 1982
ALEXANDER L. STEVAS,
CLERK

NO.

IN THE SUPREME COURT OF THE UNITED STATES

Term, 1982

ROWAN P. KELLY, JR.,
Petitioner

v.

WARMINSTER TOWNSHIP BOARD OF SUPERVISORS, FRANCIS J. McKAY, H. CHARLES FORD, SR., RICHARD G. LEDOUX, ANDREW L. WARREN, THOMAS C. HOLTER and CONRAD YEAGER

On Writ of Certiorari from the United States Court of Appeals for the Third Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Howard T. Gathright, Esq.
Pratt, clark, Gathright & Brett
68 East Court Street
Doylestown, Pennsylvania 18901
(215) 345 - 1600

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 81-1660

ROWAN P. KELLY, JR.,

Appellant

v.

WARMINSTER TOWNSHIP BOARD OF SUPERVISORS, et al.

(C. A. No. 78-3212)

SUR PETITION FOR REHEARING EN BANC

Present: SEITZ, Chief Judge, ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER, Circuit Judges, and STERN, District Judge*

The petition for rehearing filed by Appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

By the Court,

/S/ Arlen B. Adams
Circuit Judge

Dated: March 23, 1982

*Hon. Herbert J. Stern, United States District Court for the District of New Jersey, sitting by designation.

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 81-1660

ROWAN P. KELLY, JR.
Appellant

v.

WARMINSTER TOWNSHIP BOARD OF SUPERVISORS and FRANCIS J. McKAY, H. CHARLES FORD, SR., RICHARD G. LEDOUX, ANDREW L. WARREN, THOMAS C. HOLTER and CONRAD YEAGER

On Appeal from the United States District Court for the Eastern District of Pennsylvania
C. A. No. 78-3212

Submitted under Third Circuit Rule 12(6)
February 18, 1982

Before: ADAMS and SLOVITER, Circuit Judges, and STERN, District Judge.*

JUDGMENT ORDER

After considering all contentions raised by appellant, it is

ADJUDGED AND ORDERED that the judgment of the District Court be and is hereby affirmed.

Costs taxed against appellant.

BY THE COURT,

/S/ Arlen B. Adams
Circuit Judge

ATTEST:

/S/ Sally Mrvos
Sally Mrvos, Clerk

DATED: February 25, 1982

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*Hon. Herbert J. Stern, United States District Judge for the District of New Jersey, sitting by designation.

Certified as a true copy and issued in lieu of a formal mandate March 31, 1982.

Test: /S/ M. Elizabeth Ferguson

Chief Deputy Clerk, United States Court of Appeals for the Third Circuit

Costs taxed in favor of appellees as follows:

Brief $224.19

TOTAL $224.19

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ROWAN P. KELLY, JR. : CIVIL ACTION

v. :

WARMINSTER TOWNSHIP BOARD OF SUPERVISORS, et al. : NO. 78-3212

FILED MAR 18 1981

MEMORANDUM AND ORDER

GILES, J. MARCH 18, 1981

The issue raised by defendants' motion to dismiss is whether either under the principles of res judicata or collateral estopped this federal action for damages for alleged violations of constitutional and statutory rights[1] is barred by reason of a prior state court proceeding. There, plaintiff's discharge from public employment was upheld on the same matrix of facts, according to defendants, as is involved in this action.[2]

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1. Federal jurisdiction is invoked pursuant to 28 U.S.C. §1331, 42 U.S.C. §§1983 and 1985 and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. Claim also is asserted under a non-existent "28 U.S.C. §1454."

2. There is no allegation in the complaint that

ENTERED: 3-19-81
CLERK OF COURT

Plaintiff, Rowan P. Kelly, Jr., former township Chief of Police of Warminster Township, was charged on September 27, 1976, with 39 instances of conduct unbecoming an officer and after a public hearing was found responsible as to 29. A record was made of the administrative hearing before the Warminster Township Board of Supervisors ("Board"). An appeal was taken from the adverse decision to the Pennsylvania Court of Common Pleas of Bucks County. After reviewing the record below, the Honorable Harrier M. Mims upheld the dismissal action by Opinion and Order dated February 8, 1978 (hereinafter "Common Pleas OPinion"). Thereafter, a timely appeal was taken to the Pennsylvania

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footnote 2 continued

the statutorily specified state procedures for effectuating the discharge were not followed or that Plaintiff was terminated for an impermissible reason. Nor does plaintiff content that the factual determinations in the state court proceedings were contrary to the record evidence. See, Bishop v. Wood, 426 U.S. 341 (1976); Olson v. Borough of Homestead, 417 F. Supp. 784, 787 (M.D. Pa. 1976), aff'd 568 F. 2d 769 (3d Cir. 1978) (any property interest in public employment derives from state law, not the federal constitution). Although there is an assertion of a §1985 conspiracy, there is no allegation

Commonwealth Court which on April 5, 1979 affirmed the ruling below (hereinafter "Commonwealth Court Opinion"). Plaintiff's Petition for Allowance of Appeal to the Pennsylvania Supreme Court was denied by order of January 3, 1980 (hereinafter "Pennsylvania Supreme Court Order"). As part of his Petition, plaintiff attached a Summary of Argument (hereinafter "Summary of Argument").

The complaint in this court was filed on September 26, 1978. Pending the outcome of the state court appeals, proceedings in this action had been stayed by court order. With denial of the Petition for Allowance of Appeal, plaintiffs efforts here were renewed. Since matters outside the pleadings have been presented or references for consideration, i.e., the administrative record and the state court opinions and orders, and the parties have had

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footnote 2 continued

that plaintiff is the victim of invidious discrimination, or is a member of a suspect classification. Rogin v. Bensalem Township, 616 F. 2d 680, 696 (3d Cir. 1980).

full opportunity to argue on thier applicability, the motion to dismiss will be treated as one for summary judgment under Rule 12(b)(6), Fed. R. Civ. Pro. See DeTore v. Local #245, 615 F. 2d 980, 983 (3d Cir. 1980). In addition, I have reviewed the record proceedings before the administrative board and the Court of Common Pleas in assessing the motion to dismiss the §1983 action based on estoppel. Kauffman v. Moss, 429 F. 2d 1279, 1274 (3d Cir. 1970), cert. denied, 400 U.S. 847 (1970).

I. THE STATE COURT PROCEEDINGS

Plaintiff was hired as Police Chief in December, 1974, and was granted tenure by the Board of Supervisors a year later in December, 1975. The plaintiff promulgated a policy within the police department that all police business was to be kept confidential and any employee revealing any orders or directives of the plaintiff to persons outside the department would be disciplined. The authority to govern the police department rests with the Board.

When a police lieutenant, defendant Conrad Yeager, a twenty year veteran of the department was suspended by the plaintiff, without approval of the Board, for revealing one of his "confidential" general orders, an intensive general investigation of the plaintiff's conduct in office was undertaken by the Township Manager. This led to the dismissal action. (Common Pleas Opinion, p. 1, 5-6). Plaintiff demanded an appeal hearing, pursuant to the Police Tenure Act, June 15, 1951, P.L. 586, 53 P.S. §811 et seq., to test the truth or falsity of the charges against him. The eharing was conducted before the Board. After five days of proceedings and approximately 750 pages of transcript, the Board reaffirmed the original discharge action (Common Pleas Opinion, p. 1).

Although plaintiff was represented at the hearing before the Board by two able attorneys, he elected not to testify or offer any evidence on his own behalf as a matter of strategy, choosing to save his evidence for an appeal to the Court of Common

Pleas should the dismissal be confirmed. (Id., at 2)[3] The Board also made itself available to answer questions regarding allegations plaintiff may have had as to any actual bias on the part of any member of the Board. Plaintiff, however, chose not to take full advantage of the offer, again for tactical reasons. (Common Pleas Opinion, p. 12).

Following the adverse determination before the Board, plaintiff appealed to the Court of Common Pleas of Bucks County. He claimed that the Board was inherently biased because of the commingled investigatory, prosecutorial and adjudicatory functions, that the Board members were actually biased and that he was denied substantive and procedural rights at the hearing.

Plaintiff attempted to persuade the Court of Common Pleas that he should be allowed to present evidence that might have otherwise been presented in the administrative hearing. His argument was

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3. The Board retained independent counsel to advise it during the hearings. (Common Pleas Opinion, p. 12).

rejected on two grounds. First, the court found that plaintiff was not entitled as of right to supplement the record. The determination of the adequacy of the record to meet the review standard of clear and convincing evidence was held to be committed to the sound discretion of the court[4] and in his case, the record was sufficiently full and complete to demonstrate that the dismissal action was well founded. (Common Pleas Opinion, p. 2). Second, the court concluded that plaintiff had had every right and opportunity to present substantive evidence in his own behalf and that his substantive and procedural rights had been meticulously protected (Id., at 12).[5] The Commonwealth Court ruled

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4. The Court held that while the Police Tenure Act was silent on the subject, it was clear under the Local Agency Law of December 2, 1968, P.L. 1133, 53 P.S. §11308 (repealed Apr. 28, 1978, 42 P.S. §20002 [1429]; substantially reenacted 2 Pa. C.S. Ann. §754 et seq. (Supp. 1980)) and by case law, that the sound discretion of the court controls in determining whether judicial review shall be de novo. (Common Pleas Opinion, p. 2).

5. At a hearing, the Common Pleas Judge gave plaintiff an opportunity to supplement the record with relevant evidence which he was demonstrably precluded from offering in the administrative

that the court below had not abused its discretion in refusing to take additional testimony under circumstances where the absence of testimony or evidence was solely the result of his own decision made with the assistance of counsel. It affirmed that there was clear and convincing evidence of misconduct by plaintiff warranting his discharge (Commonwealth Court Opinion, p. 2-3). It also found from the record that petitioner's due process rights were not violated in any respect. Id.

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footnote 5 continued

proceedings or evidence that was unavailable to him. He did not satisfy the court that such evidence existed. Kelly v. Warminster Township, No. 76-10978-10-6, Tr. at 37-38, 53-59 (C.P. Bucks, Apr. 21, 1977).

6. Plaintiff's misconduct was found to be violative of numerous aspects of codes of conduct for police officers. Among the violations were (1) a physical and verbal assault on a district justice as well as physical assaults on other persons at other times; (2) issuance of a general order, without approval by the Board or township manager directing police officers not to enforce Sunday blue laws; (3) taking improper liberties with female employees of the police department, including soliciting an unnatural sex act, a "blow job," from one female employee and unzipping the jacket and kissing another female employee against her wishes;

Although Plaintiff had unsuccessfully challenged the constitutionality of the Police Tenure Act below, he raised for the first time on appeal to the Commonwealth Court an equal protection of the laws argument. In effect, he contended that in having to proceed under the Police Tenure Act, township policemen were not given the same due process protections as borough policemen who are subject to the Borough Code, Act of February 1, 1966, P.L. (1965)

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footnote 6 continued

(4) consorting with a married woman, not his wife, around the police station and in public; (5) directing the non-enforcement of the laws in a troubled situation until the antagonists had fought it out and the winners could be arrested; (6) being intoxicated while on duty; (7) promulgation of a general order, to be kept secret, regarding reporting of the bail policy of a district justice; (8) use of profane and vulgar language; (9) violating the collective bargaining agreement; (10) promulgation of a general intra-department secrecy order that forbade disclosure by any employee of the department of any orders or directives of the chief of police to non-members of the department, including the township manager or board of supervisors on pain of discipline - many of the orders being sarcastic and threatening to department employees; (11) suspending a 20 year veteran of the police force, Lieutenant Conrad Yeager, a defendant herein, for allegedly breaching that secrecy order. (Common Pleas Opinion, pp. 5, 15-17).

1656, 53 §45101 et seq.[7] The court declined to reach this last issue since it had not been properly raised in or considered by the court below. (Commonwealth Court p. 4)[8]

Plaintiff then petitioned for allowance of appeal to the Pennsylvania Supreme Court raising the equal protection argument as well as all his other contentions. That petition was denied.

Plaintiff resists the defendants' motion to dismiss arguing that (1) he was denied the

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7. 53 P.S. §47191, pertaining to appeals from dismissals or removals, reads in pertinent part, "Upon such appeal being taken and docketed, the Court of Common Pleas shall fix a day for a hearing and shall proceed to hear the appeal on the original record and such additional proof or testimony as the parties concerned may desire to offer in evidence." However, this "right" to supplement the record appears to be limited by what the court deems relevant. See Borough of Bristol v. Downs, 48 Pa. Cmwlth. 46, 409 A. 2d 467, 469 (1979).

8. The Borough Code, 53 P.S. §§46121, 46171, provides for the establishment of civil service commissions in boroughs of the Commonwealth having more than three (3) salaried policemen. The primary responsibility and discretion for discipline of police officers, however, rests with the borough council. The civil service commission's scope of review of disciplinary decisions is limited as to whether the council abused its discretion.

opportunity to litigate fully the constitutionality and legality of his firing before either the Board or the Court of Common Pleas; (2) the Board members were actually biased against him, having conspired prior to the hearing to fire him; (3) he has sued parties who were not parties in the state court action; and (4) the equal protection of the laws issue was not raised or decided in the prior action.

II. RES JUDICATA

Defendants argue first that the complaint must be dismissed under principles of res judicata because it involves the same cause of action, the same set of facts and the same parties or their privies. Res judicata operates to bar "repetitious suits involving the same cause of action and rests upon considerations of economy and judicial crime and public policy favoring the establishment of certainty in legal relations." Sea-Land Services, Inc. v. Gaudet, 414 U.S. 573, 378 (1973) quoting from Commissioner v. Sunnen, 333 U.S. 591, 597 (1948) and Cromwell v. County of Sac, 94 U.S. 351, 352 (1877).

> "[W]hen a court of competent jurisdiction has rendered final judgment on the merits of a cause of action, both the parties to the suit and their privies are thereafter bound not only tc every matter actually raised byt also as to every other admissible matter which might have been offered for the same purpose."

Sea-Land, supra, 414 U.S. at 578-579. See, Allen v. McCurry, 49 LW 4015, (U.S. December 9, 1980)

(doctrines of res judicata and collateral estoppel held to apply to 42 U.S.C. §1982 claims).

For the doctrine of res judicata to apply there must be a concurrence of four conditions: (1) identity of theory sued upon; (2) identity of the cause of action; (3) identity of persons and parties to the action; and identity of quality or capacity of the parties suing or being sued. Holt Hauling & Warehousing v. Rapistan, Inc., 448 F. Supp. 991, 996 (E.D. Pa. 1978); Safeguard Mutual Insurance Co. v. Williams, 463 Pa. 567, 574 (1975). If these factors are found to exist, then the court must determine whether the ultimate controlling issues have been decided in a prior proceeding in which the present parties had an opportunity to appear and assert their rights. Holt Hauling & Warehousing, supra.

Here, the state court proceeding involved the questions of whether (1) there was clear and convincing evidence warranting the Board's discharge of plaintiff, (2) whether plaintiff was denied constitutional requirement of due process in the

administrative proceeding by reason of the commingled functions of the Board or actual bias of its members and (3) whether, as of right, he was entitled to supplement the record on appeal to the Court of Common Pleas. Only the Warminster Township Board of Supervisors was named as a defendant and plaintiff had no alternative but to appeal the dismissal within the strictures of the Police Tenure Act. 53 P.S. §815.

Although Section 8 of the Local Agency Law, 53 P.S. §11308[9] does provide for a review of claims of

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9. Local Agency Law, Ch. 30A, 53 P.S. §11308 (repealed Apr. 28, 1978, 42 P.S. §20002 [1429] substantially reenacted 2 Pa. C.S. Ann. §754 et seq. (1980)):

> "(a) In the event a full and complete record of the proceedings before the local agency was not made, the court may hear the appeal de novo, or may remand the proceedings to local agency for the purpose of making a full and complete record or for further disposition in accordance with the order of the court.
>
> "(b) In the event a full and complete record of the proceedings before the local agency was made, the court to which the appeal is taken shall hear

constitutional denials, In Re Gettler, 42 Pa. Cmwlth. 415, 400 A. 2d 1339 (1979), there is no provision for the making of a claim for damages for any violations of constitutional or statutory rights. While the state reviewing court has the power to reinstate a successful appellant with back pay, benefits and emoluments of office, its review of the record evidence or the supplemented record is directed entirely to affirming or modifying the decision of the local agency. 400 A.2d

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footnote 9 continued

> the appeal without a jury on the record certified by the local agency. After hearing, the court shall affirm the adjudication unless it shall find that the same is in violation of the constitutional rights of the appellant, or is not in accordance with law, or that the provisions of this act have been violated in the proceeding before the agency, or that any finding of fact made by the local agency and necessary to support its adjudication is not supported by substantial evidence. If the adjdcation is not affirmed, the court may set it aside or modify it, in whole, or in part, or may remand the proceeding to the local agency for further disposition in accordance with the order of the court."

at 1341. Here, plaintiff seeks damages for wrongful dismissal and violation of constitutional rights. The Pennsylvania statute accorded judicial review of the administrative proceedings but plaintiff could not seek damages before either the Board of Supervisors or in the state courts on appeal from the adverse decision. Accordingly, this court holds that there is no identity of the causes of action in the state court and federal court proceedings, and that the doctrine of res judicata does not apply. See Riverside Memorial Mausoleum v. UMET Trust, 581 F. 2d 62, 68 (3d Cir. 1978).[10]

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10. In Riverside the court held that an adverse decision against a borrower in a proceeding to open a confessed judgment obtained by a broker was not res judicata to a later action by the borrower against the broker for malicious interference with his business. The later action was a tort claim, a separate cause of action, and was not a defense to the note. Therefore, it could not have been asserted as a counterclaim in the prior proceeding. Similarly, in Cubas v. Rapid American Corp., Inc., 420 F. Supp. 663, 669, fn. 10 (E.D. Pa. 1976) the district court held in an employment discrimination action that prior adverse administrative decisions were not res judicata of claims of a former employee against his former employer and union pertaining to alleged collusive discharge and breach of collective bargaining agreements.

III. COLLATERAL ESTOPPEL

The doctrine of collateral estoppel applies:

> "where the second action between the same parties is upon a different cause or demand . . . In this situation, the judgment in the prior action operates as an estoppel, not as to matters which might have been litigated and determined, but 'only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered.' . . . Since the cause of action involved in the second proceeding is not swallowed by the judgment in the prior suit, the parties are free to litigate points which were not at issue in the first proceeding, even though such points might have been rendered and decided at that time. But matters which were actually litigated and determined in the first proceeding cannot later be relitigated."

Sea Land Services v. Gaudet, supra, 414 U.S. at 593 (citations omitted). Accord, Montana v. U.S. 440 U.S. 147, 153 (1979) ("Under collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to prior litigation.")

Thus, collateral estoppel is a broader concept than res judicata. It requires only the same

issue of fact and the smae party, or privy, against whom the defense is invoked. The cause of action need not be the same nor need the parties have a balance identity. Holt Hauling & Warehousing v. Rapistan, supra, 448 F. Supp. at 996, fn. 12. The doctrine of collateral estoppel precludes the relitigation of issues actually decided in former judicial proceedings. In assessing its application to any issue there are four requirements that must be satisfied:

> (a) the issue decided in the prior adjudication must be identical with the one presented in the later action;
> (b) there must have been a final judgment on the merits;
> (c) the party against whom the plea is asserted must have been a party or in privity with a party to the prior adjudication; and
> (d) the party against whom it is asserted must have had a full and fair opportunity to litigate the issue in question in the prior action.

See, Montana v. United States, 440 U.S. 147, 153-54 (1979); Blonder-Tongue v. University of Illinois Foundation, 402 U.S. 313 (1971); Public Service Mutual Insurance Co., 616 F. 2d 704, 708 (3d Cir. 1980). The doctrine of mutuality has been abolished for federal court suits, Allen v. McCurry, supra, 49

LW at 4017, and under Pennsylvania law, see, In re Estate of Ellis, 460 Pa. 281, 286-87 (1975).

A. The Parties Are Identical Or In Privy

The Supervisors and Holter were acting at all times as agents of the Township and were, therefore, in privy with the Township defendant in the state court proceedings as to all matters related to and affecting plaintiff. While Yeager is alleged as a defendant in the federal complaint it is only as to as §1985 conspiracy claim. A conspiracy claim was neither advanced nor labeled as such in the state court proceeding. However, plaintiff did raise and litigate the issues of alleged actual bias by the Supervisors, as well as all aspects of due process, including the propriety of the conduct of the investigation initiated by Holter. Whether Holter participated in the ultimate decision-making process was an issue also raised and decided. (Commonwealth Court Op. p. 2-3).

The conspiracy allegations found in paragraph 8 of the federal complaint consist of the following:

(1) the four defendant Supervisors attempted to force plaintiff to drop his demand to join the police department's collective bargaining unit; (2) the Board considered abolishing the position of chief of police, obtained a legal opinion on the subject but not did abolish the position; (3) on September 8, 1976, Holter delayed the suspension of Yeager who had complained to him about plaintiff; (4) an investigation was commenced by Holter based on Yeager's complaints; (5) based upon information obtained through the investigation, Holter, in the presence of defendant Supervisor Warren, told plaintiff the investigation revealed serious charges whick could be aired in public and gave him the option of resigning or facing a formal request for his dismissal at the next public meeting; (6) Holter refused to tell plaintiff the charges being made against him at that time; (7) plaintiff refused to resign and Holter followed through on his recommendation of dismissal to the Board of Supervisors, on September 27, 1976, at which time

he was apprised of the charges; (8) defendant Supervisor McKay was present when a witness against plaintiff gave an oral statement to Holter during the investigation of charges; (9) prior to October 6, 1976, after plaintiff demanded a public hearing, Holter sent a letter to all employees of the police department advising of the dismissal action taken by the Board, the necessity to give "correct answers" during his investigation and offering to give immunity from discipline or prosecution as the result of information supplied in the investigation, all with the purpose "to pressure prospective witnesses to give false testimony"; (10) the Supervisors denied plaintiff copies of several written witness statements at the public hearing; (11) the Supervisors refused to give him prehearing notice and discovery procedures generally accorded criminal defendants; and (12) the Supervisors refused to answer questions under oath concerning bias, interest or prejudice against plaintiff. (Complaint ¶8).

The only conspiracy allegation involving Yeager is that he agreed with the other defendants that the

police department employees should be sent the letter discussing plaintiff's dismissal. Id. (¶8t) It is not alleged that Yeager drafted or mailed the letter. Rather, it is alleged that Holter sent the letter in his official capacity as Township Manager.

Despire plaintiff's allegation that the purpose or effect of the letter was to pressure policemen or other employees into giving false testimony, no allegation exists in the complaint that witnesses who appeared against him actually gave false testimony, or were pressured to testify by the letter or by any improper action of Yeager, or the other defendants. That Yeager merely complained to Holter about his suspension or that he felt wronged by plaintiff is immaterial to a federal conspiracy theory. Yeager had the protected right to complain. 53 P.S. §815. Moreover, the letter by Holter, which is incorporated into the complaint by reference, does not, on its face, ask prospective witnesses to do anything other than to give correct or truthful answers under oath.[11] The letter must be viewed in

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11. The text of the letter as alleged in paragraph

the context of plaintiff's admitted conduct of promulgating a policy within the police department that all police business, including his orders and directives, were to be kept confidential and secret from non-members of the department on pain of discipline. Yeager had been accused by plaintiff

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footnote 11 continued

8(t) of the complaint, without plaintiff's emphasis is as follows:

> As you know, the Chief of Police has been dismissed. In addition to the specific charges already filed against him, there have been numerous reports concerning improper or illegal behavior on his part. As a result of the facts, I, the Township Manager, have been asked to conduct a full inquiry into this matter.
>
> In order to conduct a full investigation, each police officer and civilian employee . . . is required to answer questions concerning the conduct of Rowan P. Kelly . . . Each officer and employee who is interviewed is granted full immunity from discipline or from prosecution as a result of information supplied in this inquiry. Any officer who fails to cooperate with investigation or who is suspected of providing incorrect answers to questions may be subject to disciplinary action. Your testimony is being recorded and will be transcribed. You will be asked to sign the transcription of your testimony.

of breaching that policy and had been summarily suspended.

Merely adding parties does not preclude the scrutiny of the court as to whether plaintiff is collaterally estopped. "Identity of parties is not a mere matter of form, but of substance. Parties nominally the same may be, in legal effect, different . . . and parties nominally different may be, in legal effect, the same." Chicago, R.I. & P. Ry. Co. v. Schendel, 270 U.S. 611, 620 (1926) (citations omitted). Here, viewing the allegations in the light most favorable to plaintiff, Yeager is alledged to have been an agent of the Township in the conduct of the investigation of plaintiff. As such, Yeager, like Holter, was in privy with the Board and the Township. Accordingly, the court finds that the defendants to this action were in privity with the Township, a party (defendant) to the state court action.

B. The Issues Material To Defendants Are Identical

The allegation of conspiracy in a later action based upon the same material facts as were present in a prior action does not suffice to defeat the estoppel doctrine. See, Williamson v. Columbia Gas & Light Corp., 186 F. 2d 464, 467-68 (3d Cir. 1950) cert. denied. 341 U.S. 921 (1951). Cf. Riverside Memorial Mausoleum v. UMET, supra, 581 F. 2d at 67 (alleging conspiracy with respect to claims adjudicated in state court was held insufficient to defeat application of res judicata).

Moreover, the fact that an issue arises in a slightly different context in the second action does not necessarily mean that collateral estoppel is inapplicable. Public Service Mutual Insurance Co. v. Cohen, supra, 616 F. 2d at 708. Plaintiff's factual allegations in the federal action amount to no more than that his services were terminated by the Board after an investigation report by Township Manager and that the Board reaffirmed the action after an appeal hearing. The claim that the individual defendants, who were all known actors in the administrative proceeding, are conspirators neither

succeeds in creating different parties nor in creating different issues.[12]

Plaintiff has not alleged any new facts to support his section 1983 or 1985 claims that defendants engaged in impermissible actions violative of due process. It is not alleged that the Board violated any law or regulation when it sought and received a legal opinion on abolishing the position of Chief of Police, or when it demanded that the plaintiff drop his request to be a member of the bargaining unit which he supervised, or when Holter conducted an investigation affording plaintiff the opportunity to resign.

The Board of Supervisors is responsible for the conduct of the police department. These matters

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12. The equal protection of the laws issue discussed infra, is not material to the named defendants because the Pennsylvania Legislature and not the Township prescribes the applicable judicial review procedures for administrative hearings. Even assuming that the facts of the defendants involved the Equal Protection Clause, taking the allegations of the plaintiff as true, plaintiff has not stated an Equal Protection claim upon which relief may be granted.

seem legitimately within the operational or administrative duties of the Board. More importantly, these were all factual issues specifically addressed and decided by the Court of Common Pleas. After scrutinizing the trial record, the Court found there was no evidence of bias in the conduct of the hearing by the Board within the concerns of Withrow v. Larkin, 421 U.S. 35, 46, 55, 58 (1975).[13] (Common Pleas Opinion, p. 13).

The Court of Common Pleas, the Commonwealth Court, in affirming, and the Pennsylvania Supreme Court in denying allocatur, have found that by a clear and convincing evidence standars (1) plaintiff had a full and fair opportunity to present evidence at the hearing and his decision not to do

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13. The combination of investigative and adjudicative functions does not, without more, constitute a due process violation as creating an unconstitutional risk of bias. (Id. at 58). "It is . . . very typical for the members of administrative agencies to receive the results of investigations, to approve the filing of charges or formal complaints . . . and then to participate in the ensuing hearings. This mode of procedure does not violate . . . due process of law." (Id. at 56).

so was made with the assistance of two able counsel for reasons of strategy, i.e., he believed he could wait to present all his evidence to the Court of Common Pleas. (Common Pleas Opinion, p. 2); (2) the Board meticulously protected plaintiff's procedural and substantive rights at the hearing (Id. 12); (3) the Board made itself available to answer questions under oath as to any actual bias and plaintiff chose not to take full advantage of the offer (Id.); (4) there was no competent evidence that any predisposition, bias or prejudice existed on the part of any Board member which denied plaintiff a fair hearing (Id.); (5) the charges brought were not originally preferred by the Board but were merely presented by the Board upon information received from the Township Manager; (6) there was no bias in the conduct of the hearing (Id. 13), See Withrow v. Larkin, supra, cf. In Re Murchison, 349 U.S. 133 (1955); (7) because it was a civil proceeding plaintiff was not entitled to discovery of witnesses' written statements obtained by the Township Manager in preparation for

the hearing nor was he entitled to a bill of particulars as a defendant may be in a criminal case (Id. 14); (8) the Board of Supervisors was justified in summary dismissal action, instead of suspension pending a hearing, because under the Police Duty Manual some of the charges called for immediate dismissal without prior suspension pending adjudication and, in any event, the hearing demonstrated the dismissal action was well founded (Id. 12); (9) the commingled function of the Board in this instance was consistent with federal constitutional requirements of due process; (10) the fact that one of the supervisors sat in on some of the questioning of witnesses during the investigation was not violative of plaintiff's due process rights; (Id. 6); (11) denial of his request to sit as Chief of Police on the negotiating team of police officers during contract negotiations was not evidence of bias (Id. 6, Cf. complaint ¶8 (a-c); (12) one of the Supervisors circulated a letter discussing the budget that had been drafted by plaintiff but that was not evidence

of bias (Id., cf. complaint ¶9 (a));[14] (13) plaintiff was not entitled to a de novo hearing as a matter of right; and (14) the Police Tenure Act was constitutional, meeting the requirements of due process and fundamental fairness.

The state courts affirmed conclusively that the evidence demonstrated a pattern of conduct by plaintiff unbecoming a police officer, that such acts would have a tendency to destroy public respect for police officers, and would undermine the confidence in the police department. (Common Pleas Opinion at 17.) See, Faust v. Police Civil Service Commission of Borough of State College, 2 Cmwlth. Ct. 123, 347 A. 2d 765 (1975); Nicholas Fabio v. Civil Service Commission of the City of Philadelphia, 30 Pa. Cmwlth 203, 373 A. 2d 751 (1977).

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14. There is nothing in ¶8 of the complaint which states or suggests that it was legal for the Police Chief to be a member of the bargaining unit whose members he supervised and disciplined or in ¶9 that the criticisms of his budget were not fair and factual. The Court of Common Pleas fully considered these contentions and found no evidence of actual bias.

Plaintiff has not raised a single new issue. He has not alleged that either defendant has done anything beyond the scope of his office or position.

The federal actions amounts to no more than a rephrasing of the challenge made in the first action that there was a denial of due process because the body which fired him was administratively investigator, prosecutor and judge. This issue was litigated to final judgment in the state court, and now is precluded by collateral estoppel. It is of no assistance to plaintiff that he now uses the word "conspiracy" to describe the investigatory process which involved the Township Manager, the suspended police lieutenant and the four members of the Board. The Court of Common Pleas considered plaintiff's request to supplement the record and denied it on the basis that the record evidence was replete with clear and convincing evidence that plaintiff was properly discharged because of misconduct.

> "[M]erely adding some facts, naming additional defendants or proposing a different theory of recovery does not

> convert one cause of action into a second cause of action if both actions involve the same liability creating conduct on the part of the defendants and the same alleged violation of the plaintiff's rights."

Coggins v. Carpenter, 468 F. Supp. 270, 280 (E.D. Pa. 1979) (considering the application of res judicata); see also, Sims v. Mack Trucks, Inc., 463 F. Supp. 1068 (E.D. Pa. 1979). For these reasons, the court holds that as to each legal theory raised in the instant complaint, except equal protection, each of the requisites for application of collateral estoppel has been satisfied. Plaintiff's action is barred by collateral estoppel except as to the equal protection claim.

IV. THE EQUAL PROTECTION CLAIM IS FRIVOLOUS

Plaintiff advances two arguments. Allegedly under the Borough Code policemen are subject to discipline and may demand a hearing before a civil service commission as opposed to a commingled function body such as a board of supervisors in a township of the second class.[15] It is also alleged that borough policemen have the right to supplement the record on appeal to the Court of Common Pleas.

First, it should be noted that under the Borough Code the control of the police force is in the hands of the township council and although there is a civil service review system, the scope of that administrative review is very limited. Borough of Bristol v. Downs, supra. Further, while Section 509(a)(174) of the Borough Code, 53 P.S. §46191, does read, in part, "the court . . . shall proceed to hear the appeal on the original record and such

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15. Warminster Township is a township of the second class. The Police Tenure Act applies, not only to townships of the second class, but also to boroughs and townships of the first class having a police force of less than three members and not otherwise covered by the Borough Code. 53 P.S. §811.

additional proof or testimony as the parties may desire to read into evidence," it does not appear to have been judicially interpreted as a mandatory obligation upon the reviewing court to allow such evidence. Rather, receipt of additional evidence is committed to its sound discretion, that judgment being guided by the nature of the charges and the extent of the record before the civil service commission. Borough of Bristol, supra, (although the Court of Common Pleas may consider additional evidence on appeal, such evidence must at least be related to issues raised below).

However, even assuming the correctness of plaintiff's interpretation of the relevant state statutes the equal protection argument still fails. Plaintiff has not alleged that there is any invidiously discriminatory state purpose in any difference between the review system for borough policemen and township policemen, that he is a member of a suspect classification, such as race or sex, or that he is the victim of disparate treatment as the result of an arbitrary or irrational act by the Commonwealth.

U.S. Railroad Retirement Board v. Fritz, 49 LW 4035, 4037-4038 (U.S. filed Dec. 9, 1980); Jamieson v. Robinson, No. 79-0429 slip op. at 7-9 (3d Cir. February 12, 1981). He has not, and cannot, allege that as a matter of law, commingled function review bodies are inherently biased and incapable of protecting constitutional rights. See, Withdrow v. Larkin, 421 U.S. 35 (1975). Therefore, we are left with plaintiff's contention precisely as he has pleaded it: simply because policemen of second class townships do not come under a civil service commission system or a judicial review system identical to that of borough policemen, there is a denial of equal protection (Complaint ¶¶17, 18).

Almost forty years ago, the Pennsylvania Supreme Court considered and passed on a like argument in the context of a challenge by small boroughs and townships, not covered by civil service, to the constitutionality of the Police Civil Service Act of 1941. The township and borough plaintiffs claimed the Act was special legislation. This Act, the predecessor of Borough Code, 42 P.S.

§2671, was held to be a law of general application. It provides for the appointment of a police civil service commission to adopt rules and regulations for the appointment, promotion and reduction in rank, suspension and removal of paid members of the police force in boroughs, incorporated towns and first class townships having three or more paid officers. Act of June 5, 1941, P.L. 84. Haverford Township v. Siegle, 346 Pa. 1 (1942); Bragdon v. Ries, 346 Pa. 10 (1942). The court pointed out that the Act comes into play only when a township acquires a sufficient police organization to warran its application. The court stated,

> "These cases make it clear that the legislature has the right, in regulating a particular class to exclude certain members of the class to whom the Act can have no useful application. A township having one or two or no police officers would be justified in objecting strenuously to the expense and inconvenience of maintaining a complete system of police civil service which would have no function to perform. This exception in the legislation does not constitute a classificiation of boroughs, towns and first class townships. The Act is general in both purpose and scope. The exception is reasonable and necessary, and is based on considerations as plain as they are sound.

> Finally, it is argued that the Act violates the twenty-sixth clause of section 7, Article III, prohibiting local or special laws granting to any corporation or individual any special privilege or immunity. It is said that the statute grants privileges to members of the police force in first class townships having a police force of more than three members, and denies them to policemen in other such townships. The obvious answer is that such differences always happen whenever legislation regulating municipal affairs is made effective in certain municipalities and not in others. If such an argument were sound, civil service could never have been inaugurated unless it were done in every city, town, borough and township in the Commonwealth at the same time. The patent unreasonableness of such a suggestion destroys it.
>
> All of which leads to the conclusion that the Police Civil Service Act of 1941, P.L. 84, is constitutional, and we so declare it.

Haverford Township v. Siegel, 346 Pa. at 5, 9.

Equal protection is not necessarily violated where reasonably based statutory classifications result in inequality. Dandridge v. Williams, 397 U.S. 471 (1970). Nor does the Equal Protection clause require a state to duplicate in all administrative proceedings the methods of providing full and fair review. However, it does require that the person affected by the state process be given an adequate opportunity to present his claims in the

context of the review procedure. Ross v. Moffit, 417 U.S. 600, 616 (1974). Exact equality is not always a prerequisite of the Fourteenth Amendment equal protection. Norvell v. Illinois, 373 U.S. 420, 423 (1962). A state may treat different legislatively created classes of individuals differently if there is a rational relationship to the statute's objectives. Reed v. Reed, 404 U.S. 71, 76 (1971). Thus, as the Court stated in Metropolis Theatre Co. v. Chicago, 228 U.S. 61, 69-70 (1913):

> "The problems of government are practical ones and may justify, if they do not require rought accommodations - illogical, it may be, and unscientific . . . What is best is not always discernible; the wisdom of any advice may be disputed or condemned."

The legislative history of the Police Civil Service Act, judicially reviewed, is clear: Pennsylvania has a rational reason for the reach of the civil service system. Rough accommodations made by government do not violate the Equal Protection Clause unless the lines drawn are invidious and purposeful. Norvell v. Illinois, 373 U.S. at 424; Washington v. Davis, 426 U.S. 229 (1976). See also, U.S. Railroad Retirement Board v. Fritz, supra. The Equal Protection

Clause does not guarantee exact treatment. It does guarantee that persons similarly situated are to be similarly treated. Vandermark v. Housing Authority of City of York, 492 F. Supp. 359, 363 (M.D. Pa. 1980). Different treatment of persons similarly situated may be justified if such treatment is reasonably related to a legitimate government interest, and is not based upon invidious discrimination or a suspect classification. Delaware River Basin Commission v. Bucks County Water & Sewer Authority, No. 80-1662, slip op. at 8-10 (3d Cir. Feb. 18, 1981).

The Equal Protection Clause does not require that every Pennsylvania municipal policeman have identical review procedures, regardless of the circumstances.

This court is convinced that the hearing procedures imposed by the state upon the civil service commissions for borough policemen and upon townships of the second class comply as to township policemen with the requirements of constitutional due

process.[16] See Withrow v. Larkin, supra. On the existing record, it is apparent that plaintiff was accorded a due process hearing substantially the same as that accorded to a borough policeman.

Therefore, taking all of plaintiff's allegations of fact as true, he has, nevertheless, failed to state an equal protection claim upon which relief can be granted.

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16. "The fundamental requisite of due process of law is the opportunity to be heard. Grannis v. Ordean, 234 U.S. 385, 394 (1914). The hearing must be 'at a meaningful time and in a meaningful manner.' Armstrong v. Manzo, 380 U.S. 545, 552 (1965)" Goldberg v. Kelly, 397 U.S. 254, 267 (1970); In re Application of U.S.A., 610 F. 2d 1148, 1156-1157 (3d Cir. 1979). In this case plaintiff had notice, a hearing, the right to present evidence and challenge evidence presented against him, and the right to counsel. Further, on appeal he had the opportunity to supplement the record to the extent that the Warminster Supervisors precluded him from presenting relevant evidence or denied him access to such evidence. Plaintiff failed to show that the supervisors precluded his presentation of or denied him access to relevant evidence. Finally, plaintiff has given the reasons for his discharge. See P. 7, N. 6, supra, outlining the many instances of plaintiff's alleged misconduct.

V. CONCLUSION

Accordingly, for the reasons stated above, plaintiff's complaint is dismissed with prejudice.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ROWAN P. KELLY, JR.	:	CIVIL ACTION
	:	
v.	:	
	:	
WARMINSTER TOWNSHIP BOARD	:	
OF SUPERVISORS, et al.	:	NO. 78-3212

ORDER

AND NOW, this 18th day of March, 1981, it is hereby ORDERED that for the reasons stated in the foregoing opinion, plaintiff's complaint is DISMISSED, as to each defendant, with prejudice.

BY THE COURT:

/S/ James T. Giles
J.

81-2265

Office - Supreme Court, U.S.
FILED
JUL 1 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-2265

IN THE

SUPREME COURT OF THE UNITED STATES

June Term, 1982

ROWAN P. KELLY, JR.,

Petitioner

v.

WARMINSTER TOWNSHIP BOARD OF SUPERVISORS, FRANCIS J. MCKAY, H. CHARLES FORD, SR., RICHARD G. LEDOUX, ANDREW L. WARREN, THOMAS C. HOLTER and CONRAD YEAGER

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I. Whether this Court should review a judgment entered in favor of the respondents in the court below on petitioner's claimed denial of equal protection where the record reflects that petitioner's claim in the District Court was barred by the doctrines of collateral estoppel and *res judicata*, where the District Court expressly found that petitioner's claimed denial of equal protection was frivolous and where the actions alleged to have been violative of petitioner's equal protection rights were not taken by the respondents herein.

TABLE OF CONTENTS

	Page
Statement of Questions Presented for Review	1
Table of Authorities	iii
Opinions and Judgments Below	1
Grounds for Jurisdiction	2
Constitutional Provisions and Statutes Involved ..	2
Statement of the Case	6
Summary of Argument	11
Argument	11
Conclusion	18

TABLE OF AUTHORITIES

Cases:	Page
Adickes v. S.H. Kress & Co., 398 U.S. 144, 150, 90 S.Ct. 1598, 1604 (1970)	12
Allen v. McCurry, 449 U.S. 90, 101 S.Ct. 411 (1980)	16
Baker v. McCollan, 443 U.S. 137, 142, 99 S.Ct. 2689, 2694 (1979)	13
Jacobson v. Tahoe Regional Planning Agency, 566 F.2d 1353 (9th Cir. 1978) *rev'd in part on other grounds sub. nom. Lake Country Estates v. Tahoe Regional Planning Agency*, 440 U.S. 391, 99 S.Ct. 1171 (1979)	13
Kelly v. Warminster Twp. Bd. of Supervisors, 512 F. Supp. 658 (E.D. Pa. 1981)	1, 6, 10, 12, 14
Kelly v. Warminster Twp. Bd. of Supervisors, 404 A.2d 731 (Pa. Cmwlth. 1979)	2, 6, 8
Lovely v. Laliberte, 498 F.2d 1261 (1st Cir. 1974)	17
Monell v. New York City Dept. of Social Services, 436 U.S. 658, 690-95, 98 S.Ct. 2018, 2035-2038 (1978)	13
Red Fox v. Red Fox, 564 F.2d 361, 363 (9th Cir. 1977)	17
Rizzo v. Goode, 423 U.S. 362, 371, 96 S.Ct. 598, 604 (1976)	13
Robbins v. District Court, 592 F.2d 1015 (8th Cir. 1979)	17
Roy v. Jones, 484 F.2d 96, 98 (3d Cir. 1973)	17
School Crossing Guards Assn. v. City of New York, Inc., 438 F. Supp. 1275, 1282 (S.D.N.Y. 1977)	15
Spence v. Latting, 512 F.2d 93 (10th Cir. 1974) *cert. denied* 423 U.S. 896, 96 S.Ct. 198 (1976)	17

TABLE OF AUTHORITIES *(continued)*

Cases:	Page
U.S. v. Smith, 464 F.2d 194 (10th Cir. 1972) *cert. denied* 409 U.S. 1066, 93 S.Ct. 566 (1973)	15
United States Railroad Retirement Bd. v. Fritz, 449 U.S. 166, 101 S.Ct. 453 (1980)	14
United States Constitution:	
Amendment XIV	15
Amendment XIV, §1	2
Statutes:	
28 U.S.C. §1257(2)	18
28 U.S.C. §1331	6
28 U.S.C. §1454(sic)	6
42 U.S.C. §1983	3, 12, 13, 17
53 Pa. Purdon's Stat. §811 *et. seq.*	8, 9
53 Pa. Purdon's Stat. §814	3, 14
53 Pa. Purdon's Stat. §815	4
53 Pa. Purdon's Stat. §45101 *et. seq.*	9
53 Pa. Purdon's Stat. §45201-45235	15
53 Pa. Purdon's Stat. §46191	4
53 Pa. Purdon's Stat. §55201-219	15
53 Pa. Purdon's Stat. §65201-230	15
Rules:	
Supreme Court Rule 17	11
Supreme Court Rule 17.i	11
Federal Rules of Civil Procedure 12(b)	7

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OPINIONS AND JUDGMENTS BELOW

This petition arises from an unreported judgment order entered by the United States Court of Appeals for the Third Circuit. The judgment order affirmed a summary judgment by the United States District Court for the Eastern District of Pennsylvania, *Kelly v. Warminster Twp. Board of Supervisors*, 512 F. Supp. 658 (E. D. Pa. 1981).

The District Court's conclusion that virtually all of plaintiff's claim was barred by the doctrine of collateral estoppel was predicated on a prior opinion of the Commonwealth Court of Pennsylvania, *Kelly v. Warminster Twp. Board of Supervisors*, 404 A.2d 731 (Pa. Cmwlth. 1979). Petition for allowance of appeal to the Pennsylvania Supreme Court from the Pennsylvania Commonwealth's Court opinion was denied by the Pennsylvania Supreme Court in an unreported order on January 3, 1980.

GROUNDS FOR JURISDICTION

Respondents, although disputing portions of the procedural history set forth in this portion of the petition for writ of certiorari, nevertheless concede that jurisdiction of the Supreme Court is properly invoked in that the petition for writ of certiorari is being filed within ninety (90) days of the order of the Court of Appeals denying petitioner's request for rehearing.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

A. United States Constitution, Amendment XIV, §1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

B. 42 U.S.C. §1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

C. 53 Pa. Purdon's Stat. §814 (Supp. 1981-82)

If the person sought to be suspended or removed shall demand a public hearing, the demand shall be made to the appointing authority. Such person may make written answers to any charges filed against him. The appointing authority shall grant him a public hearing, which shall be held within a period of ten days from the filing of charges in writing, and written answers thereto filed within five days, and may be continued by the appointing party for cause or at the request of the accused. At any such hearing, the person against whom the charges are made may be present in person and by counsel. The appointing authority may suspend any such person without pay pending the determination of the charges against him, but in the event the appointing authority fails to uphold the charges, then the person sought to be suspended or removed shall be reinstated with full pay for the period during which he was suspended, and no charges shall be recorded officially against his record. No order of suspension made by the appointing authority shall be for a longer period than one year.

A written record of all testimony taken at such hearings shall be filed with and preserved by the appointing authority, which record shall be sealed and not be available for public inspection in the event the charges are dismissed.

D. 53 Pa. Purdon's Stat. §815 (Supp. 1981-82)

The suspended or dismissed employee shall have the right to appeal to the Court of Common Pleas of the county in which he was employed.

E. Pa. 53 Purdon's Stat. §46191 (Supp. 1981-82)

If the person suspended, removed or reduced in rank shall demand a hearing by the [Civil Service Commission], the demand shall be made to the Commission. Such person may make written answers to any charges filed against him not later than the day fixed for hearing. The Commission shall grant him a hearing which shall be held within a period of ten days from the filing of charges in writing, unless continued by the Commission for cause at the request of the Council or the accused. At any such hearing, the person against whom the charges are made may be present in person and by counsel. The Council may suspend any such person, without pay, pending the determination of the charges against him, but in the event the Commission fails to uphold the charges, then the person sought to be suspended, removed or demoted shall be reinstated with full pay for the period during which he was suspended, removed or demoted and no charges shall be officially recorded against his record. A stenographic record of all testimony taken at such hearings shall be filed with and preserved by the Commission which records shall be sealed and not be available for public inspection in the event the charges are dismissed.

All parties concerned shall have immediate right of appeal to the Court of Common Pleas of the county, and the case shall there be determined as the Court deems proper. No order of suspension made by the Commission shall be for a longer period than one year. Such appeal shall be taken within sixty (60) days from the date of entry by the Commission of its final order and shall be by petition. Upon such appeal being taken and docketed,

the Court of Common Pleas shall fix a day for a hearing and shall proceed to hear the appeal on the original record and such additional proof or testimony as the parties concerned may desire to offer in evidence. The decision of the Court affirming or revising the decision of the Commission shall be final, and the employee shall be suspended, discharged, demoted or reinstated in accordance with the order of Court.

The Council and the person sought to be suspended, removed or demoted, shall at all times have the right to employ counsel before the Commission and upon appeal to the Court of Common Pleas.

STATEMENT OF THE CASE

A. Course of Proceedings

On September 26, 1978, petitioner instituted this action in the District Court alleging civil rights jurisdiction pursuant to 28 U.S.C. §1454(sic) and §1331. Petitioner, formerly the Chief of Police of Warminster Township, Pennsylvania, generally averred a deprivation of his civil rights through the procedures utilized by the township and its board of supervisors in terminating plaintiff's employment. The termination was effected on September 27, 1977, and confirmed following a five day public evidentiary hearing after which petitioner was found responsible for 29 instances of conduct unbecoming an officer. The specific violations of which petitioner was convicted are set forth in the opinion of the District Court, 512 F. Supp. at 658 n.6, and include physical and verbal assault on a district justice, taking improper liberties with female employees of the police department, including soliciting an unnatural sex act from one female employee, and being intoxicated while on duty.

On December 22, 1978, respondents moved the District Court to dismiss or stay all proceedings pending the resolution of petitioner's appeal from the Court of Common Pleas to the Commonwealth Court of Pennsylvania. That motion was granted by the District Court on March 30, 1979, and all proceedings in the District Court were stayed pending resolution of the state court proceedings. On July 26, 1979, the Commonwealth Court entered an opinion affirming the Court of Common Pleas in all respects [*Kelly v. Warminster Twp. Board of Supervisors*, 404 A.2d 731 (Pa. Cmwlth. 1979)] and petition for allowance of appeal was denied by the Pennsylvania Supreme Court on January 3, 1980, in an unreported order.

Thereafter, respondents filed a motion to dismiss in the District Court arguing the applicability of the doc-

trines of *res judicata* and collateral estoppel with respect to each of petitioner's contentions. Oral argument was heard by the District Court and, having chosen to review the state court record, the District Court elected to treat the defendants' motion as a motion for summary judgment pursuant to Rule 12(b) of the Federal Rules of Civil Procedure. On March 18, 1981, the District Court entered a memorandum and order finding that petitioner's causes of action were not barred by the doctrine of *res judicata*, but that, with the exception of the claimed denial of equal protection, the causes of action were barred by the doctrine of collateral estoppel. The District Court further held that, taking all of petitioner's allegations of fact as true, he had failed to state an equal protection claim upon which relief could be granted against the named respondents. Accordingly, the complaint was dismissed.

Petitioner appealed to the United States Court of Appeals for the Third Circuit. On February 25, 1982, that court entered a judgment order affirming the District Court's dismissal of petitioner's complaint and on March 23, 1982, the Court of Appeals entered an order denying petitioner's request for rehearing. This Petition for Certiorari followed.

B. Statement of the Facts

Following five days of hearings which consumed some seven hundred and fifty pages of transcript, on October 20, 1976, the Board of Supervisors of Warminster Township, Pennsylvania, voted to affirm its previous decision to dismiss petitioner from his position as Chief of Police of the Warminster Township police force. The decision was made following receipt of evidence establishing 29 instances of conduct unbecoming an officer, the most blatant of which include: (1) a verbal and physical assault on a district justice; (2) a separate assault on one George McAllister; (3) numerous instances of sexual advances to female employees and others including a sex-

ual advance to one Joan Ault, unzipping the jacket of one Gloria Smith, kissing one Judy Hufnell against her wishes and soliciting an unnatural sex act from a female employee of the department; (4) indulging in alcoholic beverages to the point of intoxication while on duty; (5) issuing a general order without the approval of the Board of Supervisors directing police officers not to enforce Sunday closing laws; and (6) directing a police dispatcher during a period of increased tension in the township to advise police officers to "let them fight and we will arrest the winners." Despite being given opportunity to do so, petitioner, upon the advice of counsel, did not testify at the Board of Supervisors hearings apparently having determined that he would automatically have the right to do so in the Court of Common Pleas. The Court of Common Pleas chose only to receive any testimony which petitioner had been precluded from presenting to the Board of Supervisors and this determination was upheld by the Pennsylvania Commonwealth Court (404 A.2d at 733-34).

The Bucks County Court of Common Pleas affirmed the determination of the Board of Supervisors. With the exception of the equal protection claim that Court directly addressed each constitutional contention made by petitioner in the instant lawsuit including the allegations that the Board of Supervisors which voted to fire the plaintiff was biased and prejudiced, that petitioner was denied due process by not being given written statements from witnesses testifying against him, that he was dismissed without being advised of the allegations against him, that his dismissal constituted criminal punishment without the benefit of constitutional safeguards, and that the Police Tenure Act, 53 Pa. Purdon's Stat. §811 *et. seq.* (Supp. 1981-82), unconstitutionally commingled prosecutorial and adjudicative functions. Similarly, the Pennsylvania Commonwealth Court had presented to it each of the just recited claims and also affirmed petitioner's dismissal.

Following the entry of the Court of Common Pleas order affirming petitioner's dismissal and while the matter was pending on appeal in the Commonwealth Court, petitioner commenced the instant action in the Eastern District of Pennsylvania. Significantly, at no time during the proceedings in the Court of Common Pleas did petitioner ever advise that court of his intention to commence the federal action or of any intention on his part to preserve his equal protection claim or any other constitutional contention for adjudication by the federal courts.

Following institution of the federal court litigation, respondents obtained a stay of proceedings in order to permit resolution of the state court appeal which involved the same issues as petitioner was raising in the federal court. The District Court granted the stay and in due course the Court of Common Pleas judgment was affirmed by the Commonwealth Court and the Pennsylvania Supreme Court denied review.

Thereafter, respondents re-commenced activity in the District Court by filing a motion to dismiss predicated upon principles of *res judicata* and collateral estoppel and arguing that every issue which petitioner raised in the District Court proceeding had either been or clearly could have been raised in state court and was, therefore, to be considered resolved as between the parties and their privies. The District Court rejected the *res judicata* arguments but accepted the collateral estoppel arguments with respect to each issue except that of the claimed denial of equal protection. The District Court's opinion concluded, however, that the equal protection claim was also subject to dismissal because the disparities claimed by petitioner between the Police Tenure Act, 53 Pa. Purdon's Stat. §811 *et. seq.*, under which petitioner was discharged, and the Pennsylvania Borough Code, 53 Pa. Purdon's Stat. §45101 *et. seq.*, which petitioner claimed gave police officers in a similar situation more substantial procedural rights, were clearly per-

missible under the "rational relationship" standard of scrutiny applicable to the two laws, *Kelly v. Warminster Twp. Bd. of Supervisors*, 512 F. Supp. 658 (E.D. Pa. 1981).

On petitioner's appeal to the Court of Appeals respondents renewed their argument that the doctrine of *res judicata* also barred petitioner's equal protection argument and, in the alternative, urged acceptance of the District Court's conclusion that petitioner's equal protection contentions were frivolous. The Court of Appeals entered an order affirming the order of the District Court dismissing petitioner's Complaint.

SUMMARY OF ARGUMENT

This case contains none of the factors mentioned in Supreme Court Rule 17 pertaining to the exercise of discretion in the granting of a writ of certiorari. The decisions of the District Court and of the Court of Appeals do not vary from settled authority nor do the matters include any important question of federal law. On the contrary, the order of the Court of Appeals dismissing the petitioner's appeal whether read as an adoption of the District Court's conclusion that the equal protection claim was frivolous or as adoption of respondent's contention that consideration of the equal protection claim is barred by the doctrine of *res judicata* is fully in keeping with the decisions of this Court and of the various courts of appeals.

ARGUMENT

I. THE PETITIONER'S CLAIMED DENIAL OF EQUAL PROTECTION IS FRIVOLOUS AND WAS CORRECTLY DISMISSED BY THE LOWER COURTS.

Rule 17.1 of the Rules of this Court provides in relevant part:

> A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor.

The Petition for Writ of Certiorari filed herein reflects no such reason. Indeed, not only was petitioner's claim of denial of equal protection rejected by the courts below but the District Court did not hesitate to label it as frivolous.

Petitioner's equal protection complaints can be summarized as follows:

(a) Police officers employed by boroughs within the Commonwealth of Pennsylvania are enti-

> tled to a hearing before a civil service commission before discharge by the Board of Supervisors is finalized while police employees of a second class township are afforded only a hearing in front of the Board of Supervisors which originally ordered the discharge; and (b) on appeal to the Court of Common Pleas the court is allegedly required to hear all evidence which a dismissed borough policeman wishes to present while the same court may limit the supplementing of the evidentiary record in the case of a discharged township police officer. The claimed denial fails for two reasons.

First, assuming, *arguendo*, that there were any merit to the petitioner's contention that he was treated unequally, his claim against these respondents would still fail for the reasons set forth by the District Court:

> The equal protection of the laws issue, discussed *infra*, is not material to the named defendants because the Pennsylvania legislature and not the township prescribes the applicable judicial review procedures for administrative hearings. Even assuming that the acts of the defendants involved the equal protection clause, taking the allegations of plaintiff as true, plaintiff has not stated an equal protection claim upon which relief may be granted.

512 F. Supp. at 666n.12.

In *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 150, 90 S.Ct. 1598, 1604 (1970), this Court set forth the prerequisites for a recovery under §1983:

> The terms of §1983 make plain two elements that are necessary for recovery. First, the plaintiff must prove *that the defendant has deprived him of a right* secured by the "Constitution and laws" of the United States. Second, the plaintiff must show *that the defendant* deprived him of this constitutional right "under color of any statute, ordinance, regula-

tion, custom or usage, of any state or territory.". . . . (Footnote omitted; emphasis supplied.)

Adickes has given rise to a plethora of opinions both from this Court and from the courts of appeals requiring direct participation on the part of the named defendant in the alleged violation of civil rights. *See, e.g., Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 690-95, 98 S.Ct. 2018, 2035-2038 (1978) (Municipality liable only if it causes harm through official policy or custom); *Rizzo v. Goode*, 423 U.S. 362, 371, 96 S.Ct. 598, 604 (1976) (Liability of supervisory police officials attaches under §1983 only if their actions proximately caused plaintiff's harm); *Baker v. McCollan*, 443 U.S. 137, 142, 99 S.Ct. 2689, 2694 (1979) (Public official liable under §1983 only "if he causes the plaintiff to be subjected to deprivation of his constitutional rights"); *Jacobson v. Tahoe Regional Planning Agency*, 566 F.2d 1353 (9th Cir. 1978) *rev'd in part on other grounds sub. nom. Lake Country Estates v. Tahoe Regional Planning Agency*, 440 U.S. 391, 99 S.Ct. 1171 (1979) (Executive directors and members of regional planning agency not responsible for alleged unconstitutional inverse condemnation of plaintiff's property where enabling legislation did not provide such defendants with the power to condemn.)

The District Court's conclusion, affirmed by the Court of Appeals, that petitioner's failure to allege any personal involvement on the part of these defendants is fatal to his claimed denial of equal protection is entirely supported by the record and the cases and does not warrant review by this Court.

The claimed denial of equal protection suffered by the petitioner is equally lacking in merit. The claim fails because petitioner's treatment was, in fact, not significantly different than that of a discharged borough policeman and because, to the extent that differences did exist, they were rationally related to the Commonwealth's legitimate governmental interests in permitting

local municipalities to determine in what form and at what expense their local government will exist.

The District Court having reviewed the entire state court record concluded, as had the Pennsylvania state courts, that petitioner had been afforded a full opportunity for hearing before the Board of Supervisors together with meaningful appellate review. 512 F. Supp. at 670. The Police Tenure Act pursuant to which petitioner was removed from office, 53 Pa. Purdon's Stat. §814 (Supp. 1981-82), provided petitioner with full procedural due process, i.e., the right to be heard, notice of the hearing, the right to present evidence and challenge evidence presented against him and the right to counsel. Petitioner availed himself of each of those rights and, in fact, petitioner's hearing before the Board of Supervisors lasted for five days and consumed some seven hundred and fifty pages of transcript. Had he been a borough policeman, the Constitution would have demanded no more. When reviewed in the light of the actual opportunities to be heard afforded plaintiff in this lawsuit as reflected by the state court record, it is clear that plaintiff sustained no denial of equal protection.

Even if the differences in procedure utilized with respect to borough police officers were constitutionally relevant, it is clear that such differences pass the "rational relationship" test applicable here. Since the differences do not involve either "suspect classification" nor impinge on "fundamental interests", they violate equal protection only if they bear no rational relationship to a legitimate state purpose. *United States Railroad Retirement Board v. Fritz*, 449 U.S. 166, 101 S.Ct. 453 (1980). The District Court opinion reflected clear awareness of that principle and properly applied it in concluding that petitioner's claim was meritless. No compelling reason for this Court to review that determination exists and none is suggested in the Petition for Writ of Certiorari.

Certainly, a state is permitted to leave to local municipalities the right to determine the form of government which they choose to adopt and, concomitantly, the expense which will necessarily follow. Obviously, the creation of a separate civil service commission, as required by the borough code, entails certain additional expenses and bureaucratic structures which, depending on the needs of a given area, may be more or less desirable in particular municipalities. Thus, municipalities in Pennsylvania are given the right to declare themselves first or second class townships or boroughs understanding the substantive and procedural governmental implications which necessarily follow. *See, e.g.*, 53 Pa. Purdon's Stat. §55201-55219 (Supp. 1981-82) (Proceedings to establish first class township); 53 Pa. Purdon's Stat. §65201-65230 (Supp. 1981-82) (Proceedings to establish second class township); 53 Pa. Purdon's Stat. §45201-45235 (Supp. 1981-82) (Proceedings to establish borough).

So long as any police officer is afforded rights sufficient to comport with the requirements of due process, there can be no doubt that the state, in order to further other goals, may adjust the procedural forms in which the due process is afforded. One such legitimate goal is to ensure that each municipality has available to it the form of government best suited to its individual needs. Equal protection requires that persons similarly situated with respect to challenged governmental action be similarly treated. *School Crossing Guards Assn. v. City of New York, Inc.*, 438 F. Supp. 1275, 1282 (S.D.N.Y. 1977). The Fourteenth Amendment condemns arbitrary and invidious discrimination; it does not require exact equality. *U.S. v. Smith*, 464 F.2d 194 (10th Cir., 1972) *cert. denied* 409 U.S. 1066, 93 S.Ct. 566 (1973).

The Commonwealth possesses a legitimate governmental interest in providing varying forms of local government in order to permit municipalities to select the one most suited to their needs and financial resources.

Nothing in the equal protection clause precludes that legislative determination.

II. THERE IS NO REASON FOR THIS COURT TO REVIEW THE EQUAL PROTECTION CLAIM BECAUSE IT IS BARRED BY THE DOCTRINE OF *RES JUDICATA*.

Although the District Court rejected respondents' contention that the equal protection claim is barred by the doctrine of *res judicata*, analysis of this Court's opinions and of numerous opinions from the courts of appeals requires a conclusion that the claim was barred in the federal court and, therefore, is not appropriately available for review by this Court.

In *Allen v. McCurry*, 449 U.S. 90, 101 S. Ct. 411 (1980), this Court noted:

> The federal courts have traditionally adhered to the related doctrines of *res judicata* and collateral estoppel. Under *res judicata*, a final judgment on the merits of an action precludes the parties or their privies from re-litigating issues that were or *could have been raised in that action*. (Citations omitted; emphasis supplied.)

449 U.S. at 94, 101 S. Ct. at 414.

It is entirely clear that petitioner had a full opportunity to present any constitutional claims he desired to the state courts, witness his plenary litigation of the arguments that he was deprived procedural due process through the unconstitutional commingling of the prosecutorial and adjudicative function. Moreover, petitioner made no attempt in the Court of Common Pleas to reserve any federal claims for proceedings at a later date in the federal system. In such a situation, it is clear that all of petitioner's contentions which could have been raised in the state court proceedings are barred from further litigation. Such a holding would have been in accor-

dance with opinions of at least five different circuit courts of appeals. *See, e.g., Roy v. Jones*, 484 F.2d 96, 98 (3d Cir., 1973); *Red Fox v. Red Fox*, 564 F.2d 361, 363 (9th Cir., 1977); *Spence v. Latting*, 512 F.2d 93 (10th Cir. 1974) *cert. denied* 423 U.S. 896, 96 S. Ct. 198 (1976); *Lovely v. Laliberte*, 498 F.2d 1261 (1st Cir. 1974); *Robbins v. District Court*, 592 F.2d 1015 (8th Cir. 1979).

In *Robbins*, plaintiffs had seen their parental rights terminated by the District Court of Worth County, Iowa, after a hearing produced an adjudication that the plaintiffs were unfit as parents. After the District Court's determination was affirmed by the Iowa Supreme Court, plaintiffs instituted a §1983 action alleging several constitutional deprivations, only one of which had been raised and resolved by the Iowa Supreme Court. Nevertheless, the Eighth Circuit refused to hear the remaining constitutional issues finding them precluded by the doctrine of *res judicata*. In holding that doctrine applicable, the Eighth Circuit applied a test for identity of causes of action which is equally applicable to the instant litigation:

> It is equally apparent that the causes of action in each proceeding are the same. Appellants argued in state court as they do here that their parental rights were unjustly and unconstitutionally terminated. Thus their §1983 action is based on the same nucleus of operative fact before the Iowa courts. Appellants had the opportunity to raise these issues before the Iowa Supreme Court and having failed to do so cannot now attempt to circumvent the doctrine of claim preclusion by merely alleging a different theory of recovery where the actions arise out of the same transaction. (Citations omitted.)

592 F.2d at 1018.

Thus, not only is the petitioner's claimed denial of equal protection without merit, he was precluded from

raising it in the lower courts by the doctrine of *res judicata*. Thus, the claim is not available for review in this Court. Of course, petitioner had available to him the option of direct appeal to this Court at the time that the Pennsylvania Supreme Court refused allowance of appeal, 28 U.S.C. §1257(2) (Supp. 1982), but elected to forego that option.

CONCLUSION

For all of the foregoing reasons, it is submitted that the order of the Court of Appeals affirming the dismissal of the petitioner's complaint does not warrent review by this Court on writ of certiorari and it is requested that the petition be denied.

BENNETT, BRICKLIN,
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BY: _____
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